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of Minorities
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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Third report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

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Introduction

1. In resolution 1989/27, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to appoint two of its members to prepare a report on existing international standards pertaining to the right to a fair trial. The Sub-Commission also requested that the two members recommend "which provisions guaranteeing the right to a fair trial should be made non-derogable".

2. On 7 March 1990, the Commission on Human Rights, in its decision 1990/108, welcomed the Sub-Commission's decision to appoint Mr. Stanislav Chernichenko and Mr. William Treat to prepare a report on the right to a fair trial and requested the Sub-Commission to consider that report at its forty-second session, directly under the agenda item 10 (d) entitled "Administration of justice and the human rights of detainees: the right to a fair trial".

3. The two members of the Sub-Commission prepared a first brief report (E/CN.4/Sub.2/1990/34) to provide an overview of the subject and to indicate the areas which needed further study. The brief report also made some general observations and set forth the principal treaties and other international human rights standards which were the most protective of each attribute of a fair trial. Further, the first brief report discussed considerations relevant to making non-derogable at least some aspects of the right to a fair trial. In addition, the brief report recommended that a more comprehensive study should be undertaken on the right to a fair trial and how that right might be strengthened.

4. In resolution 1990/18, the Sub-Commission recommended that the Commission and the Economic and Social Council endorse the decision to entrust Mr. Chernichenko and Mr. Treat, as Special Rapporteurs, with the preparation of a study entitled "The right to a fair trial: current recognition and measures necessary for its strengthening".

5. The Commission on Human Rights, in resolution 1991/43, and the Economic and Social Council in resolution 1991/28, endorsed Sub-Commission resolution 1990/18 and requested the Special Rapporteurs to draft a questionnaire on the right to a fair trial.

6. The two Special Rapporteurs prepared a second report (E/CN.4/Sub.2/1991/29) principally containing a summary of the interpretations of the right to a fair trial by the Human Rights Committee and also including a revised questionnaire relating to national practices in regard to the right to a fair trial.

7. The Sub-Commission in resolution 1991/14, the Commission in resolution 1992/34 and the Economic and Social Council in resolution 1992/..., asked the two Special Rapporteurs to continue their study on the right to a fair trial. It was anticipated that their third report in 1992 would focus on the interpretations of international organizations in the Americas and Europe of the right to a fair trial, and that their fourth report in 1993 would focus on national practices in regard to the right, based in particular on responses to the questionnaire, and that their fifth report in 1994 would contain recommendations for strengthening the implementation of the right.

8. Section I of the present (third) report summarizes the discussion of the second report and indicates several revisions which will appear in the final report. Section II identifies additional expressions of international fair trial norms that have been identified since the second report of July 1991. Section III provides a very preliminary analysis of the responses received thus far to the questionnaire. Section IV suggests further work which needs to be accomplished in order to prepare a more comprehensive report on the right to a fair trial and recommends ways to strengthen that right. Section V contains a supplemental bibliography of relevant material identified since the second report. Addendum 1 to the report summarizes the interpretations of fair trial standards by the European Commission and Court of Human Rights. Addendum 2 summarizes the interpretations of fair trial standards by the Inter-American Commission on and Court of Human Rights. Addendum 3 summarizes information on amparo, habeas corpus and similar proecedures; Addendum 3 also contains the notes for the entire third report.

I. COMMENTS ON AND REVISIONS TO THE FIRST TWO REPORTS

9. The first brief report (E/CN.4/Sub.2/1990/34) looked at the treaties and other instruments defining the attributes of the right to a fair trial which are the most protective of the right. The second report briefly noted the discussion of the first report and made several revisions to the text which will appear in the final report; identified new sources of international fair trial norms; summarized the interpretations of fair trial standards by the Human Rights Committee under the International Covenant on Civil and Political Rights; and contained a revised version of the preliminary questionnaire on national practices in regard to the right to a fair trial.

10. Several members of the Sub-Commission congratulated the Special Rapporteurs on their report and particularly praised the summary of the Human Rights Committee's interpretations of the right to a fair trial. One alternate member of the Sub-Commission drew attention to the interesting and useful analysis of the interpretations of the Human Rights Committee relating to the right to a fair trial. He also raised questions as to whether Governments would devote sufficient time and resources to responding to the detailed questionnaire. Recognizing the enormous breadth of the study, he suggested that the Special Rapporteurs begin their work with the fair trial rights of persons who are detained and then widen their study to include administrative and civil proceedings not involving detainees. In addition, he suggested that the Special Rapporteurs eventually consider preparing model legislation in regard to the right to a fair trial and a list of fair trial rights which should not be the subject of derogation, with a view to preparing a new protocol to the International Covenant on Civil and Political Rights. He expressed the view that amparo and habeas corpus were fundamental to the right to a fair trial.

11. During the forty-second and forty-third sessions of the Sub-Commission, members suggested that certain aspects of the right to a fair trial, for example, the right to petition for habeas corpus or amparo, should be made non-derogable even during periods of emergency. In that regard, the Commission, in its resolution 1992/35, called on all States "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her

liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful" and "to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency".

12. Two other members of the Sub-Commission supported the possibility of eventually preparing a model code or declaration. One of those members also stated that the fair trial report should include material on the right to habeas corpus.

13. A member suggested that the Special Rapporteurs consider more fully the application of fair trial standards during states of emergency and referred to the report of Mr. Despouy (E/CN.4/Sub.2/1991/28) in that regard. Another member drew attention to the use of military courts against civilians who commit offences in areas under military control or against military property. He believed that such cases should also be afforded the right to a fair trial.

14. Another member supported the methodology of the proposed study and hoped that it would help develop international standards, such as normative guidelines. He thought the standards should embody a normative expression of neutral issues to assist countries struggling to improve their judicial process. The member also warned of the use of military courts to try civilians. He noted that although the Covenant did not prohibit military courts from trying civilians, a military court might impinge upon a civilian's rights. He stressed that the mere handling of military secrets should not bring a person within the jurisdiction of military courts. The member also encouraged the Special Rapporteurs to pay special attention to the right to counsel and, in particular, to how quickly legal counsel might consult with a detainee after arrest. In addition, the member urged States to strengthen the adversarial elements of their justice systems. He said that article 14 of the Covenant supported the use of the adversarial elements, recognizing in particular the right to give evidence. The member, noting his own recent experience in drafting a constitution for Slovenia, expressed the hope that Eastern European countries would strengthen the adversarial components of their justice systems, and that the study would provide the necessary guidance.

15. One member of the Sub-Commission noted a number of problems with the Spanish translation of the second report, suggested that more attention should be given to the separation of minors from adults in detention, referred approvingly to paragraphs 35 to 37 of the second report which dealt with restrictions on prison visits and correspondence, said that prohibiting arbitrary restrictions was very important, and recommended that the right to correspondence and to visit detainees should not be limited to their families and that foreigners who were detained should be entitled to consular visits. He also suggested that the Special Rapporteurs should focus on the right to an automatic appeal for prisoners who face the death penalty as well as the practical application of the internationally accepted norm under which the death penalty was not applied to juvenile offenders and to pregnant women. He also hoped that the questionnaire would be revised to focus on several of those issues. To the extent that those suggestions are focused on national

practices, they will be taken into account in the fourth report to be presented to the Sub-Commission at its forty-fifth session. As to the application of international human rights norms concerning detained juveniles, Ms. M.C. Bautista has prepared a report (E/CN.4/Sub.2/1991/24) for the Sub-Commission. The issues were to some extent covered in the revised questionnaire and the Sub-Commission decided to recommend the dissemination of the revised questionnaire annexed to the second report.

16. A non-governmental organization submitted a written intervention (E/CN.4/Sub.2/1991/NGO/28) suggesting that the two Special Rapporteurs should also consider fair trial and other procedures in administrative adjudication which may deal with refugees, administrative dentention, rights of employees and similar matters.

17. During the Sub-Commission's discussion of the second report, several members and representatives of non-governmental organizations presented information about practices in particular countries relating to the right to a fair trial, as well as on the related issue of the independence of the judiciary and practising lawyers. Among the countries discussed were the People's Republic of China (including information on Tibet), Colombia, Guatemala, India, Indonesia (focusing particularly on East Timor), the Islamic Republic of Iran, Japan, Kenya, Kuwait, Myanmar, Nepal, Papua New Guinea, the Philippines, the Republic of Korea, Turkey, and the United States of America. The observers for Colombia, Indonesia, Japan, Kenya, Myanmar, the Republic of Korea, and Turkey provided further information or otherwise replied on these issues. The two Special Rapporteurs expect to utilize information about national practices in their fourth report to the forty-fifth session of the Sub-Commission in 1993.

18. The two Special Rapporteurs welcome the substantive comments and suggestions made by members and alternates of the Sub-Commission as well as by representatives of Governments and non-governmental organizations. The comments and suggestions were reflected in the resolution adopted by the Sub-Commission or will be reflected in the present and in later reports. The comments also reflect the need for coordination in regard to recommendations arising from the studies on the right to a fair trial, states of emergency, and the independence of the judiciary and the protection of practising lawyers.

II. ADDITIONAL EXPRESSIONS OF FAIR TRIAL NORMS AND TRENDS IN THEIR DEVELOPMENT

19. In August 1991, Mr. L. Joinet presented his first report (E/CN.4/Sub.2/1991/30 and Add.1-4) to the Sub-Commission on strengthening the independence of the judiciary and the protection of practising lawyers. That report focused principally on advisory services and national practices; the material on national practices will be taken into account in the fourth report on the right to a fair trial expected for 1993.

20. In August 1991, Mr. J. Carey presented a brief working paper on habeas corpus to the Working Group on Detention. The Working Group's report (E/CN.4/Sub.2/1991/27, para. 32) reflected that Mr. Carey and Mr. J.C. Hitters were invited to prepare an in-depth working paper on

habeas corpus and amparo, with a view to assisting Mr. Chernichenko and Mr. Treat in the preparation of their report on the right to a fair trial. During the Sub-Commission's discussion of this issue, it was understood that any material received from Mr. Carey and Mr. Hitters would be incorporated in future reports on the right to a fair trial. The issue of habeas corpus and amparo would remain on the agenda of the Working Group. No working paper had been received as of the time the present report was prepared. The Special Rapporteurs would be pleased to incorporate any working paper into future reports; in the meantime, annex III to the present report discusses habeas corpus and amparo.

21. The attention of the Special Rapporteurs has recently been drawn to a very useful document entitled "Executive Action and the Rule of Law" prepared by the International Commission of Jurists as a result of a conference in Brazil in 1962. The document sets forth fundamental principles for a fair trial in administrative cases, including the requirement of adequate notice to interested parties; adequate opportunity for them to prepare the case, including access to relevant data; their right to be represented by counsel or other qualified person; adequate notice of the decision and the reasons; and their right to recourse to a higher administrative authority or court. The document indicates that it would be advisable for administrators to promulgate regulations after having secured expert advice, consult organizations or interested groups, and give an opportunity to interested individuals to present their views.

22. On 5 August 1990, the 19th Islamic Conference of Foreign Ministers in Cairo adopted the Cairo Declaration on Human Rights in Islam. Article 19 of the declaration provides for equality of all individuals before the law, the right to a judicial remedy for each person, individual penal responsibility, no penalties except as prescribed by Shariah, the presumption of innocence, and an honest trial in which the rights of defence are fully guaranteed. Article 20 forbids arrests, restraints on liberty, exile or punishment without legitimate reasons. Article 21 forbids the taking of hostages. Article 24 states that all the rights in the declaration are subordinate to the principles of Shariah.

23. On 2 December 1990, a group of scholars convened by the Institute for Human Rights, Abo Akademi University, in Turku/Abo, Finland, adopted a Declaration of Minimum Humanitarian Standards (see E/CN.4/Sub.2/1991/55), which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances. Article 9 of that declaration delineates "judicial guarantees which are recognized as indispensable by the community of nations" in criminal cases, including the right to be informed without delay of charges, trial within a reasonable time in the presence of the accused, all necessary rights and means of defence, individual penal responsibility, the presumption of innocence, no compulsory self-incrimination, no double jeopardy and no criminal responsibility in the absence of a law defining the offence applicable at the time it was committed. Article 11 affords "judicial guarantees" in regard to the imposition of security measures of assigned residence, internment or administrative detention for security reasons.

Article 4 guarantees "the right to an effective remedy, including habeas corpus, ... as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty."

24. From 20 September to 4 October 1991, the 38 participating States of the Confernce on Security and Cooperation in Europe (CSCE) met in Moscow. The Concluding Document of the Moscow meeting stated that the participating States "will respect the internationally recognized standards that relate to the independence of judges and legal practitioners ... which, inter alia, provide for (i) prohibiting improper influence on judges ... [and] (v) guaranteeing tenure and appropriate conditions of service ...." The participating States also agreed, "A state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms." In addition, the Concluding Document contains several significant protections for persons deprived of their liberty. Furthermore, the participating States agreed to recognize non-governmental organizations, to facilitate their visits to countries to observe human dimension conditions and to welcome their activities observing compliance with CSCE commitments.

25. Representatives of non-governmental organizations met in Tunis from 29 November to 2 December 1991 for the Arab-African Seminar on Criminal Justice and Penal Reform, held under the auspices of the Centre for Human Rights, the Tunisian League for Human Rights, Penal Reform International and the Arab Institute of Human Rights. The Seminar recommended that no person should be subjected to detention garde à vue for more than 24 hours; that any person placed in detention should immediately be permitted to contact his/her family and doctor; that interrogations should take place in the presence of a lawyer who may consult his/her client in private; that detention garde à vue should be permitted only in locations prescribed by law; that persons under detention garde à vue should not be subjected to pressure to incriminate themselves; that no one should be subjected to torture, arbitrary arrest or preventive detention for his/her beliefs or religious convictions; that provisional detention should not be imposed as a sanction; and that public authorities should not make contact with persons in provisional detention prior to their appearance in court. The Seminar made a number of other recommendations in regard to the independence of the judiciary, the rights of the defence, penal reform and other related issues.

26. At its eleventh session, in March 1992, the African Commission on Human and Peoples' Rights was to begin a study of fair trial issues. The Special Rapporteurs look forward to receiving any results of that study.

III. SUMMARY OF INITIAL RESPONSES TO QUESTIONNAIRE

27. The two Special Rapporteurs prepared an initial questionnaire for Governments and that questionnaire was transmitted to Member States, specialized agencies, and non-governmental organizations in mid-April by the Centre for Human Rights with a request for responses and comments, if possible by 31 May 1991. It was recognized by the Special Rapporteurs that the questionnaire requested detailed information and responses could not be prepared either quickly or easily.

28. The questionnaire recognized that such inquiries were time consuming for respondent Governments. Accordingly, the questionnaire contained two parts. In the first part Governments were principally asked to send copies of the relevant codes, rules, regulations, and decisions setting forth procedures in civil courts, criminal courts, emergency/special courts, military courts, and certain administrative processes.

29. If Governments were able to provide more substantive responses, they were requested to consider the questions raised in part II. Here again, it was recognized that answering the questions might be time consuming. Accordingly, Governments were asked to answer only those questions beginning with Arabic numbers and which were in bold print. If Governments were able to provide more complete responses, they could answer the questions beginning with small letters and which asked for more detailed information.

30. The two Special Rapporteurs received comments and suggestions on its questionnaire and the Sub-Commission requested that a revised questionnaire be sent once again to Member States. Furthermore, since the Commission had requested, in its decision 1991/43, that questionnaires be sent to interested specialized agencies and non-governmental organizations, the Sub-Commission requested that a slightly modified questionnaire be distributed to them since those bodies had concerns and information relating to more than one country. The Sub-Commission also requested that the questionnaire be sent to associations of lawyers which possessed information on the right to a fair trial.

31. On 22 November 1991, the revised questionnaire was sent to Governments, specialized agencies and non-governmental organizations concerned as well as to associations of lawyers.

32. As of mid-April 1992, the Governments of Australia, Austria, Bangladesh, Cuba, Iraq, Japan, Mexico, New Zealand, the Philippines, Qatar, Sweden, Sudan, Turkey, Uruguay and Yugoslavia had submitted substantive responses to the first or revised questionnaire - most with detailed information and copies of relevant legislation. The Government of Finland presented a brief account of the general policies and principles applicable in that country in regard to the right to a fair trial. The Government of Norway provided copies of legislation and referred the Special Rapporteurs to information provided in the periodic reports the Government had submitted to the Human Rights Committee. The Government of Monaco transmitted copies of the legislation relevant to the right to a fair trial. In addition, the following Governments submitted brief responses: Belarus, Bolivia, Brazil, Chad, Ireland, Japan, Myanmar, Panama and Papua New Guinea.

33. Replies were also received from the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the World Bank and the General Agreement on Tariffs and Trade. The International Committee of the Red Cross provided an explication of the judicial guarantees afforded by humanitarian law as well as two useful memoranda.

34. Amnesty International has submitted material on several countries from different regions of the world as part of a continuing commitment to assist the Special Rapporteurs by providing information on national laws and practices. The International Centre of Sociological, Penal and Penitentiary Research and Studies and the International Institute of Humanitarian Law transmitted completed questionnaires in regard to trial procedures in Italy. The International Association of Lawyers provided useful information and completed a questionnaire about trial procedures in France along with material on European interpretations of the right to a fair trial. The Belgian Section of the International Union of Magistrates responded to the questionnaire and provided legislative material on trial procedures in Belgium. A brief response was received from the International Federation Terre des Hommes. The Inter-parliamentary Union provided information about trials relating to parliamentarians. The Regional Council on Human Rights in Asia provided a detailed assessment of trial procedures in the Philippines. The Inter-Church Committee for Refugees submitted material on procedures relating to the detention of asylum seekers. The Japan Federation of Bar Associations submitted material on trial procedures in Japan. The American Bar Association communicated with the Special Rapporteurs and indicated that it would submit a response to the questionnaire. The Czech Bar Association submitted a response to the questionnaire in regard to the Czech and Slovak Federal Republic. Responses to the questionnaire were also received from the Korean Bar Association, the Dutch Association for the Judiciary and the Law Society of New South Wales. The Andean Commission of Jurists transmitted a brief response to the questionnaire for Peru. Lawasia sent an answer to the questionnaire for Indonesia.

35. All these replies and other information received will be fully taken into account by the Special Rapporteurs in their future work, particularly, in their fourth report in which they expect to analyse national practices in this field.

IV. CONCLUSIONS AND RECOMMENDATIONS

36. In resolution 1992/34 of 28 February 1992 entitled "The right to a fair trial", the Commission on Human Rights welcomed the brief report (E/CN.4/Sub.2/1990/34) and the second report (E/CN.4/Sub.2/1991/29) prepared by the two Special Rapporteurs, Mr. Stanislav Chernichenko and Mr. William Treat, and requested them to continue the preparation of their study, including the distribution of a revised questionnaire to Governments, specialized agencies, non-governmental organizations, associations of lawyers and other sources of information.

37. The two Special Rapporteurs have begun their study with a review of the fair trial standards in international instruments and in the interpretations of international bodies, such as the Human Rights Committee, the European Commisson and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. As further interpretations become available, this information will need to be updated.

38. The two Special Rapporteurs have prepared an initial questionnaire and a revised questionnaire on the right to a fair trial, which have been distributed.

39. Since a review of national practices will be a very time-consuming, difficult and complex task, the Special Rapporteurs will produce an analysis of national practices, including information received in response to the questionnaires, in their fourth report for the forty-fifth session of the Sub-Commission. The fourth report should also include an analysis of the questions posed and views expressed by the Human Rights Committee in reviewing reports by States parties to the Covenant on Civil and Political Rights.

40. In light of the material collected during this study and the views of Governments, it would be desirable to consider ways of strengthening the implementation of present fair trial standards and to improve the protection of the right to a fair trial by, for example, making non-derogable the right to a fair trial, certain aspects of that right, and/or the right to an effective remedy against arbitrary or prolonged pre-trial detention. In that regard the study would consider the elaboration of a Third Optional Protocol to the International Covenant on Civil and Political Rights which would add article 14 (the right to a fair trial provision) and article 2 (3) (the right to an effective remedy, particularly against arbitrary or prolonged pre-trial detention) to the list of provisions which cannot be the subject of derogation under article 4 of the Covenant.

41. In light of the material collected during this study and the views of Governments, it would also be appropriate to consider the desirability of elaborating upon present fair trial standards in the light of interpretations by international bodies and contemporary national practices so that basic fair trial guarantees might be incorporated into international standards, through a draft declaration, model code, model legislation or normative guidelines, for consideration by the Sub-Commission at future sessions. In this regard, the Special Rapporteurs and the Sub-Commission should endeavour to assure that the present fair trial standards are not weakened in the process of elaborating upon and delineating those standards.

42. On the basis of the material collected during this study and the views of Governments, it further appears that States should be encouraged in appropriate ways to implement existing fair trial standards in law and practice. In addition, in light of the views of Governments, it would be desirable to consider other means of strengthening the implementation of the right to a fair trial, as discussed in the first brief report.

43. The two Special Rapporteurs note that the task they have undertaken covers a vast and complex subject. The two Special Rapporteurs wish to express their appreciation for the cooperation and assistance they have received in taking the first several steps of the study.

V. SUPPLEMENTAL SELECTED BIBLIOGRAPHY

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Addendum

INTERPRETATIONS OF INTERNATIONAL FAIR TRIAL NORMS BY THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

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Introduction

1. The right to a fair trial has been a norm of international human rights law for over 40 years and a substantial body of interpretation has developed, elaborating and construing this right, but relatively little research has been undertaken to analyse the developing content of the right. The three principal sources of interpretation of the right to a fair trial have been the Human Rights Committee, the European Commission and Court of Human Rights and the Inter-American Commission on and Court of Human Rights. The second report provided an initial summary of the interpretation of the right to a fair trial in the decisions of the Human Rights Committee. This addendum to the third report summarizes the European materials on the right to a fair trial.

2. The first section of this addendum discusses the application of fair trial standards to "civil rights and obligations". The second section discusses the application of fair trial standards to different sorts of cases involving criminal charges. The subsequent sections deal principally with procedures in criminal cases, but also cover relevant interpretations in regard to administrative, civil and other proceedings. These subsequent sections related to the rights to be informed promptly of charges, a trial within a reasonable time, counsel, an adequate defence, an interpreter, an independent and impartial tribunal, witness, the presumption of innocence, public hearing, fair hearing and public pronouncement of the judgement.

3. This addendum also summarizes the interpretations which the European Court of Human Rights and the European Commission of Human Rights have given in their decisions on individual cases concerning provisions on the right to fair trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms. 1/ In reading these interpretations, however, some of the older cases must be considered with care. While the Commission's earlier decisions may not be expressly overruled, the Commission's later cases may not be consistent with its earlier views. It should also be noted that this addendum focuses almost exclusively on the Commission and Court interpretations under article 6 of the European Convention. There are, however, several other provisions which are relevant to the right to a fair trial. For example, articles 3 and 8 of the European Convention deal with conditions of detention and the rights of prisoners to engage in correspondence or to receive visitors. Article 5 focuses on arrest, detention, the right to be informed promptly of charges, the right to be brought promptly before a judicial authority, and release pending trial. Article 7 does not permit an individual to be found guilty of an offence which was not proscribed by law at the time when the conduct was committed; nor may a heavier sentence be imposed than applicable at the time the offence was committed. Protocol No. 7 to the European Convention provides the right to review by a higher tribunal, the right to compensation for miscarriages of justice, and the prohibition of double jeopardy.

4. Article 6 of the European Convention provides:

> "1. In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press

and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and the cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have free assistance of an interpreter if he cannot understand or speak the language used in court."

I. CIVIL RIGHTS AND OBLIGATIONS

5. Article 6 (1) of the European Convention grants the right to a fair and public hearing in the determination of "civil rights and obligations". The concept of "civil rights and obligations" is not defined in article 6 (1). The European Court and Commission have stated that it is an autonomous concept and it must be interpreted independently having regard to the nature of the claim and to the purpose of the claim. 2/ It must be determined independently of any classification in national legal systems, 3/ although the legal traditions of Member States must be taken into consideration.

6. The purpose of article 6 (1) in this connection is, according to the European Commission, to "lay down guarantees concerning the mode in which claims or disputes concerning legal rights and obligations (of a 'civil' character) are to be resolved". 4/ Article 6 (1) covers all proceedings that are decisive for private rights and obligations. 5/

7. The European Court has declared that in ascertaining whether a case concerns the determination of a "civil right or obligation" only the "character of the right at issue is relevant". 6/ Consequently, "The

character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence". 7/

8. Article 6 does not "directly protect the individual's 'civil rights' as such against acts or decisions which modify, annul or otherwise interfere with them". 8/ Hence, the mere fact that "[a]n individual's private rights are adversely affected by the acts of another party, whether a public authority or not, does not therefore involve a violation of Article 6 (1)". 9/

9. It is not necessary that both parties to the proceedings be private persons. In fact, the European Court stated in the König case that: "If the case concerns a dispute between an individual and a public authority, whether the latter acted as a private person or in its sovereign capacity is ... not conclusive." 10/

10. The European Commission has further held that when an individual's rights have been adversely affected by action taken by a public authority, article 6 (1) entitles the person to obtain access to domestic remedies. 11/ Article 6 (1) would thus require that there be a tribunal with jurisdiction to determine the matter. 12/

11. The European Court and Commission have examined the concept of "civil rights and obligations" in numerous cases. The cases discussed here are not an exhaustive list of issues that involve "civil rights and obligations", but merely an exemplification of issues. The following questions or disputes have been regarded to involve determination of "civil rights or obligations":

(a) Bankruptcy proceedings; 13/

(b) Labour disputes; 14/

(c) Right of a prisoner to contact a lawyer to institute libel proceedings against a prison officer; 15/

(d) Libel proceedings; 16/

(e) Confinement of a person to a mental hospital, when that determination affected the person's capacity to administer his/her property; 17/

(f) Right to practise a private profession; 18/

(g) Proceedings to determine the qualifications of a professional; 19/

(h) Ownership and scope of a granted patent; 20/

(i) Right to property; 21/

(j) Contractual rights and obligations; 22/

(k) Family-related issues; 23/

(l) The right to health insurance benefits; 24/

(m) Land consolidation issues; 25/

(n) Claims for compensation against domestic authorities; 26/ and

(o) Personal injury claims against a perpetrator. 27/

12. The European Commission stated in X. v. Belgium that adjudication of bankruptcy affects the "civil rights and obligations" of a person in the meaning of article 6 (1) of the Convention, since the immediate effect of the proceedings were to deprive the debtor of the right to conduct business and to administer his property in person. 28/

13. In Zand v. Austria, the Commission held that a labour dispute, involving the termination of an employment and work without payment, concerned the determination of the applicant's "civil rights and obligations". 29/ Similarly, the Buchholz case dealt with a labour dispute concerning dismissal from employment due to rationalization measures. The European Court took it for granted that the right claimed by the applicant was a "civil right". 30/

14. In the Golder case, a convicted prisoner was confronted with allegations of assault on a prison officer. The British authorities refused to permit him to consult a lawyer in order to institute libel proceedings. The Court held that the right which the applicant wished to invoke was a "civil right" within the meaning of article 6 (1). 31/ The European Commission stated that "[t]here are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer". 32/

15. Isop v. Austria dealt with defamation and the right to seek redress in national courts. The European Commission found that [t]he right to enjoy a good reputation and the right to have determined before a tribunal the justification of attacks upon such a reputation must be considered to be a "civil right" within the meaning of article 6 (1). 33/

16. In the Winterwerp case, the Court held that "civil rights" were involved in a decision to confine an individual to a mental hospital, particularly if the decision affected the person's ability to administer his/her property. 34/

17. In Kaplan v. United Kingdom, the applicant's existing right to conduct insurance business had been restricted. The European Commission found that the right to carry on a commercial activity in the private sector was of a private nature and of "civil" character, and therefore to be regarded a "civil right" for the purposes of article 6 (1). 35/ In later cases the right to practice medicine has been found to involve a "civil right". Similarly, the right to practice law also involves a "civil right", even though that right has a public law aspect in regard to advocacy before the courts.

18. The European Commission found in X. v. Switzerland that the question of ownership of patent rights concerned the applicant's "civil rights and obligations" within the meaning of article 6 (1). Another question that arose

was whether the conditions for the registration of the patent rights had been fulfilled. That process was held to be of "essentially administrative character" and thus outside the scope of article 6. 36/

19. Family-related issues have been found to involve "civil rights and obligations". The European Court found in the Bock case that divorce proceedings concerned the applicant's "civil rights and obligations". 37/ In X. v. Sweden the European Commission held that a parent's right to access to a child living in another country involved "civil rights and obligations". 38/ H. v. United Kingdom dealt with a mother's right to her child which the local authorities had taken away from her. 39/

20. In the Feldbrugge case, 40/ the applicant argued that she was entitled to health insurance benefits. The health insurance authorities were of the opinion that she was fit to resume employment and therefore not entitled to any benefits. The European Court found that the right claimed concerned a "civil right".

21. The European Court has found that land consolidation proceedings involve "civil rights and obligations". 41/ A decision by the local authorities affected the applicant's property rights and such a decision would thus be decisive for the private rights of the owners.

22. In the Zimmermann and Steiner case, 42/ the applicants were tenants living near an airport. The applicants sought compensation from the local authorities for damage caused by air pollution and noise from the airport. The European Court held that the rights claimed by the applicants were of private character and therefore "civil" within the meaning of article 6 (1).

23. The applicants in the Lithgow case 43/ were shareholders whose interests had been nationalized by the British authorities. The applicants argued that the compensation which they had received was inadequate and discriminatory. The European Court found that the applicants' right to compensation was derived from the ownership of shares in the companies concerned and was therefore to be regarded as "civil rights".

24. In Adler v. Switzerland, 44/ the applicant had brought an administrative law action against the Swiss authorities for damages allegedly suffered in his commercial activities because of the acts of public officials. The European Commission stated that it could not be excluded that the claim for damages concerned a "civil right" within the meaning of article 6 (1).

25. The applicant in the Axen case 45/ had been injured in a traffic accident and he brought action against the perpetrators. The applicant's claim for damages was considered to involve "civil rights".

26. The European Court and Commission have held that the following questions and disputes do not involve determinations of "civil rights and obligations": 46/

(a) Disputes over citizenship; 47/

(b) Right to enter a country; 48/

(c) Prisoner's request for provisional release pending trial; 49/

(d) Right to work in prison 50/ and to receive payment for such work; 51/

(e) Determination of the right to pardon and clemency; 52/

(f) Assessment of taxes 53/ and right to tax rebates; 54/

(g) Religious disciplinary proceedings; 55/

(h) Right to pension and insurance funds when the person has not contributed to them; 56/

(i) School receiving government "recognition" for purposes of allowing foreign students to study there; 57/

(j) Right to political asylum and refugee status; 58/ and

(k) Disciplinary proceedings against civil servants. 59/

27. The European Commission declared in X. v. Austria that proceedings instituted in order to obtain confirmation of citizenship were not covered by "civil rights and obligations" in article 6 (1). The Commission stated that "[i]t is a prerogative of the State to regulate citizenship and the relevant rules constitute public law". 60/

28. The European Commission has further stated that the right to enter and the right to reside in a particular country are not to be considered "civil rights" and, therefore, a decision to deport an alien does not constitute the determination of a person's "civil rights" within the meaning of article 6 (1). 61/

29. In the Neumeister case, the applicant had requested the Austrian authorities for release pending trial. The request was considered in a non-public session at which the prosecution officers were heard, but the applicant and his lawyer were not allowed entry. The European Commission held that article 6 (1) could not be given such a broad interpretation as to include these kinds of proceedings and concluded that the proceedings did not concern the determination of "civil rights". 62/

30. In X. v. Federal Republic of Germany, a prisoner had instituted proceeding against the German authorities, based on the authorities' refusal to allow him to work and to organize work in the prison. The European Commission found that to allow a prisoner to work constituted a privilege and such a privilege could only be granted by the State in its exercise of public law. Accordingly, a proceeding dealing with this issue did not involve the determination of a "civil right or obligation". 63/ Similarly, another prisoner's claim against the State for adequate payment for his work in prison was found to fall under public law and not to concern a "civil right" within the meaning of article 6 (1) of the European Convention. 64/

31. The European Commission held in X. v. Austria that the right to pardon and the right to commute the sentence of a convicted person was a "prerogative

of mercy vested in the President of the [Austrian] Republic" and clemency proceedings could therefore not fall within the scope of "civil rights and obligations". 65/

32. In X. v. Belgium, the European Commission stated that assessment of road taxes related to fiscal law and the exercise of public authority. The Commission concluded that article 6 (1) was not applicable in the case. 66/ Furthermore, proceedings before fiscal authorities regarding the right of a trader to obtain tax reimbursement have also been found not to involve "civil rights and obligations". 67/

33. In X. v. Denmark, a Danish clergyman of the State Church had been dismissed after disciplinary proceedings. The European Commission declared that disputes over issues of faith or religious practice decided by a tribunal did not involve the determination of "civil rights and obligations". The European Commission further stated that litigation concerning access to or dismissal from civil service fell outside the scope of article 6 (1). 68/ The Commission has previously held that, in general, there is no right to public employment. 69/

34. The applicant in X. v. Switzerland had no right to compensation for physical injury from military insurance funds to which he had not contributed. The European Commission held that it was a unilateral initiative by the State to decide to compensate the military forces. Litigation relating to such payment was not found to involve "civil rights or obligations". 70/

35. In Church of X. v. United Kingdom, a church wanted to challenge the lawfulness of measures introduced by the British Minister of Health, consisting of the refusal to recognize the Church as an educational establishment for the purpose of admitting foreign nationals to the school. The European Commission found that the measures were administrative and did not involve the determination of "civil rights or obligations". 71/

II. CRIMINAL CHARGES

36. According to article 6 (1) of the European Convention, a person is entitled to a fair and public hearing in the determination of criminal charges against him. "Charge" has been defined by the European Court as "the official notification given to an individual by the competent authority of an allegation that he [or she] has committed a criminal offence". 72/

37. Article 6 (2) stipulates that a person charged with a criminal offence shall be presumed innocent until proved guilty. Certain minimum rights are also to be guaranteed these individuals, according to article 6 (3). Minimum rights include the right to be informed promptly of the nature and cause of accusations, the right to adequate time and facilities to prepare a defence, the right to legal assistance, the right to examine witnesses, and the right to an interpreter.

38. The guarantees described in articles 6 (2) and 6 (3) are restricted to persons subject to "criminal charges" and it is therefore important to define what "criminal charges" involves.

A. Classification of the offence

39. The European Court and Commission have examined how the legal systems of member States classify the offence charged whether the offence is placed in the scope of criminal law, disciplinary law, or both concurrently. 73/ If a State classifies an offence as non-criminal the European Court and Commission will determine independently whether the offence should be classified as criminal under the European Convention.

40. The European Commission originally interpreted the term "criminal charge" in accordance with the national definitions in the member States. 74/ Protection under the Convention was only provided if the domestic law defined the offence as criminal.

41. The European Court saw a danger in letting the States determine the meaning of "criminal charges". It would defeat the object and purpose of article 6 to allow a State to evade the requirements by simply changing the classification of an offence to non-criminal. Consequently, the Court declared that it will interpret the meaning of "criminal charge" independently of national law. 75/ The national classification is thus no longer regarded as conclusive.

42. The European Court has declared that additional criteria to be taken into consideration when determining whether charges are criminal are the nature of the offence, and the nature and degree of severity of the penalty incurred. 76/

B. Nature of the offence

43. The nature of an offence ultimately determines if the act is criminal or disciplinary, and whether articles 6 (2) and 6 (3) apply. "The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects." 77/ If a State classifies an offence as criminal, the State must grant the accused the protection under articles 6 (2) and 6 (3), regardless of the nature of the offence or the penalty.

44. In the Engel case, 78/ five Dutch soldiers were subject to military disciplinary proceedings. The offence was classified as disciplinary and not criminal under Dutch law. The soldiers had not been given the protection granted in article 6. The European Court held that article 6 applied to military disciplinary proceedings.

45. In the Campbell and Fell case, 79/ a group of prisoners engaged in a protest by sitting down in a corridor of the prison and refusing to move. Prison officers removed them after a struggle, during which injuries were sustained both by officers and prisoners. The applicants, two of the prisoners, were charged with the disciplinary offences of mutiny or incitement to mutiny and doing gross personal violence to an officer - acts classified as "especially grave offences" in the prison rules.

46. The European Court held that the classification of the offences as disciplinary, according to national law, was not held to be decisive for the purposes of the European Convention. 80/ The offences committed in prison,

although classified as disciplinary offences, corresponded to criminal offences and could thus be held to be of a criminal nature. The European Court stated that theoretically there is nothing "to prevent conduct of this kind being subject of both criminal and disciplinary proceedings". 81/

47. If a State has changed the classification of an act, the nature of the act will be decisive. Decriminalization of an offence does not change the nature of the offence. In the Oztürk case, a man charged with a "regulatory" offence, the causing of a traffic accident, was entitled to article 6 protection, since the offence was of a criminal character. 82/

48. Disciplinary proceedings by associations against professionals, such as doctors and attorneys, have not apparently been regarded as criminal proceedings, although the Court has left the question open. 83/ When the penalty imposed by a professional association is a mere reprimand or warning, the members have not been granted a right to a hearing in front of the disciplinary body. 84/ Nor has the European Commission found disciplinary proceedings against civil servants to constitute criminal proceedings. 85/

C. Nature and severity of the penalty

49. In the Engels case, the European Court held that if the penalties involved "serious deprivation of liberty" it would characterize the offence as "criminal" under the European Convention. The Court found that the prohibition of a soldier to leave the camp during off-duty hours and the confinement of soldiers during off-duty hours do not constitute a "serious deprivation of liberty". Imprisonment did, however, constitute such deprivation. 86/

50. Finally, proceedings to determine a person's citizenship or to deprive a person of citizenship do not require article 6 protection since States have plenary power over citizenship. 87/

III. RIGHT TO BE INFORMED PROMPTLY OF CHARGES

51. Article 6 (3) (a) of the European Convention requires that: "Everyone charged with a criminal offence has the minimum right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him." In addition, article 5 (2) of the European Convention requires that: "Everyone who is arrested shall be informed promptly ... of the reasons for his arrest and of any charge against him." 88/

52. If the defendant appears to be aware of the charges against him or her, the European Commission will consider the requirements of article 6 (3) (a) satisfied. For example, in Neumeister v. Austria, 89/ the European Commission declared inadmissible a complaint that Austrian officials violated article 5 (2). The Commission noted that the defendant, suspected of tax fraud, had served 11 weeks of preventive detention about a year before his arrest. Additionally, an investigating judge had interrogated him two weeks before his arrest. The European Commission concluded from these facts that the defendant must have been aware of the nature and cause of the accusation against him.

53. In Freda v. Italy, 90/ the applicant had been held in preventive detention for murder and was released after being warned against absconding. The applicant fled to Costa Rica and was later arrested and handed over to the Italian authorities. The applicant argued that he had been deprived of his liberty and not been informed of the reasons for his arrest during two days when he was being transported from Costa Rica to Italy. The European Commission held that the applicant must have been aware that "in leaving the place of residence assigned to him he had failed to comply with obligations imposed on him ... and that this would necessarily give rise to an arrest warrant being issued". 91/ The Commission found no violation of article 5 (2).

54. In Kamma v. the Netherlands, 92/ the applicant claimed that he had not been informed of the criminal charges promptly. The opening judicial investigations, dated 29 September and 2 December 1970, had not been communicated to him in writing until 25 January 1971. The European Commission noted that the applicant had confessed to certain of these charges in order to obtain an early trial, and held that the applicant had been informed of the charges included in the decision of 29 September. Regarding the remaining charges to which the applicant had not confessed, the Commission held that he had not been indicted on these charges at all. So even if "there had been a certain delay in informing the applicant of the accusations, he [had] not suffered any prejudice in this respect". Article 6 (3) (a) had been observed.

55. According to article 6 (3) (a) an accused is entitled to be informed of the cause and the nature of the accusation against him or her. The European Commission has interpreted "cause" of the accusation to be the material facts which form the basis of the accusation. The "nature" of the accusation, however, refers to the legal character or classification of the material facts. The information should contain the material needed to enable the accused to prepare his or her defence. 93/ There is thus a clear nexus between the requirement of information in article 6 (3) (a) and the right to "have adequate time and facilities for the preparation of his offence" in article 6 (3) (b). 94/ The evidence on which the charge is based does not necessarily have to be mentioned.

56. The European Commission initially required relatively little detail in the charges. For example, the Commission found no violation in the case of a Belgian public official accused of disobeying a law prohibiting civil servants from accepting gifts. 95/ The official complained that he was not sufficiently informed of the charges because the examining magistrate had said merely, "You are accused of corruption". The Commission, however, found this statement sufficient under article 6 (3) (a), since the applicants received more information about the charges at a later stage. More recent cases under article 5 (2) have required more detail in regard to the reasons for an arrest and charges.

57. The Nielsen case 96/ dealt with the question whether the information given about the charges was sufficiently detailed to enable the suspect to prepare his defence. The indictment against the applicant accused him of instigating and planning a robbery that another person had committed. During the trial, the prosecution accused the applicant of having used hypnosis to

instigate the robbery. The applicant contended that the term "hypnotic influence", or any similar expression, was not mentioned in the indictment nor could it be interpreted into the word "instigation".

58. The European Commission found that the applicant could not be justified in presuming that the concept of hypnotic influence was excluded from the term "instigation". The Commission pointed out that the defence had been aware of and had accepted that the prosecution was carrying out a psychiatric examination on the perpetrator, the robber. The defence had further acknowledged the significance of the psychiatric examination as evidence in regard to the upcoming proceedings against the applicant. Moreover, the defence had not objected to the prosecution calling a psychiatrist as an expert witness, in fact they had even called their own expert witness. The European Commission therefore concluded that the applicant had been informed of the nature and cause of the accusations against him in sufficient detail. 97/

59. The European Convention requires that accused persons be informed of the accusations in language that they understand. It is unclear whether it is sufficient to inform the defence counsel of the accusation or whether defendants themselves must be informed. The European Commission has declared that a general right for the accused to have court files translated could not be derived from article 6 (3) (a). "[T]he rights secured under article 6 (3) are those of the defence in general and not those of the accused separately." 98/

60. In X. v. Austria, 99/ the applicant, who spoke no German but only French and Italian, complained that the Austrian court violated article 6 (3) (a) by refusing to give him a full translation of the court files. The European Commission pointed out that part of the files were drafted in German, which the applicant's counsel understood, while many other documents were in French and could thus be read by the applicant himself. The applicant had been assisted by an interpreter when he was informed of the charges against him, and he had further been given a French translation of the indictment. The Commission found no violation of article 6 (3) (a).

61. In addition, article 6 (3) (a) does not require authorities to translate the charges into the language the defendant understands. In the Kamasinski case, 100/ the European Court acknowledged that there is a need for "special attention to be paid to the notification of the 'accusation' to the defendant". A defendant who does not speak the court's language is put at a disadvantage if he or she is "not also provided with a written translation of the indictment in a language he or she understands". The European Court held that in this case oral explanations given in English to the English-speaking defendant had been sufficient to comply with article 6 (3) (a) since the defendant had failed to complain to domestic courts about his alleged lack of understanding of the charges. The defendant had in fact informed the trial judge that he understood the charges and waived interpretation of the indictment into English.

62. In the Brozicek case, 101/ the European Court held that the Italian Government had violated article 6 (3) (a) by failing to provide translations of the charges in the defendant's mother tongue or in one of the

official United Nations languages. The Czech defendant, after receiving a copy of the charges in Italian, complained that he did not understand Italian and requested a translation in his mother tongue or in an official United Nations language. Despite repeated complaints, the authorities ignored his request. The European Court held that the Italian authorities should have complied with the defendant's request. The Court added that if the authorities could have established the defendant's proficiency in Italian, then a translation would have been unnecessary, but, the Court noted, the Italian authorities made no attempt to discover the defendant's knowledge of Italian.

63. The European Commission stated in X. v. the Netherlands 102/ that defendants lodging appeals in domestic courts could not complain of violations of article 6 (3) (a) because they already know the charges against them. Additionally, defendants must keep the court informed of their whereabouts so that the courts can send them communications about the charges and the appeal proceedings.

IV. RIGHT TO PROCEEDINGS WITHIN A REASONABLE TIME

64. Article 6 (1) provides that everyone is entitled to a hearing within a "reasonable time" in the determination of his or her civil rights and obligations or in criminal charges against him. All proceedings covered by article 6 of the European Convention are subject to the "reasonable time" requirement. The requirement applies to all parties to court proceedings. 103/ The purpose is to guarantee a judicial decision within a reasonable time and to provide protection against excessive procedural delays.

65. The European Court has declared that the European Convention "stresses the importance of administering justice without delays which might jeopardize its effectiveness and credibility". 104/ In criminal cases, a person charged with a criminal offence should not remain too long in a state of uncertainty about his or her fate. 105/ In a civil case, a person might have "an important personal interest in securing a [prompt] judicial decision on the lawfulness" of a measure related to a civil right or obligation. 106/ A tribunal should weigh the concerned person's interest of a prompt decision against the importance of a careful, thorough examination of the case and correct judicial proceedings.

66. Article 5 (3) of the European Convention must be noted in connection with the "reasonable time" requirement in article 6 (1). Article 5 (3) provides that "everyone arrested or detained ... shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release pending trial".

67. Article 5 (3) refers to the length of detention and to the obligation to keep a prisoner in detention no longer than is reasonable. Article 5 (3) deals with the time period between the arrest and the moment at which criminal charges are brought against a person.

68. Article 6 (1) refers to the length of criminal or civil proceedings and it relates to the time period between charges being brought against a person and the end of criminal and civil proceedings.

69. The "reasonable time" requirement in article 5 (3) has, however, been interpreted more restrictively than in article 6 (1). The difference in interpretation is based on the idea that detention imposes a greater infringement upon the individual's freedom than having a case pending in a lengthy civil or criminal process. 107/ A person in detention is entitled to have his or her case given priority and to have proceedings conducted with particular expedition, 108/ and an arrested or detained person shall be brought "promptly" before a judge.

70. The word "promptly" in article 5 (3) is clearly distinguishable from the less strict requirement of "reasonable time" in both article 5 (3) and 6 (1). 109/ "Promptly" requires a much shorter period of time than "reasonable time". Interpretation of the word "promptly" can be exemplified by the Brogan case, in which the European Court examined whether "reasonable time" in article 5 (3) had been exceeded, and whether the accused had been brought "promptly" before a judge. The applicants in the case had been arrested and detained for suspicion of involvement in acts of terrorism in Northern Ireland. The European Court stated that the assessment of "promptness" had to be made in the light of the object and the purpose of article 5, namely "the protection of the individual against arbitrary interference by the State with his right to liberty". 110/

71. The European Court declared that the degree of flexibility in interpreting and applying the notion of "promptness" is very limited. The Court accepted that a situation with widespread terrorism, such as in Northern Ireland, had the effect of prolonging the period during which the authorities may keep a person in custody. 111/ The European Court concluded that a detention of four days and six hours fell outside the strict constraints of article 5 (3), 112/ and that none of the applicants had been brought "promptly" before a judicial authority. The United Kingdom has since sought to derogate from its obligation in this regard. The legality of that derogation is now being examined by the European Court.

72. "Reasonable time" under article 5 (3) is a shorter time period than under article 6 (1). A long delay in trial proceedings may be reasonable and justifiable due to, e.g., the complexity of the case, but that may not justify a continued detention. The European Court and Commission have found that a situation may thus constitute a violation of article 5 (3), but not a violation of article 6 (1). 113/

73. The European Court has held that the time period to be taken into consideration under article 6 (1) begins, in criminal cases, at the moment at which a "criminal charge" is brought against a person. It is only from that specific moment at which a "determination of ... any criminal charge against him" is possible according to article 6 (1). 114/ The European Commission has further asserted that "the relevant stage is that at which the situation of the person concerned has been substantially affected as a result of a suspicion against him". 115/ This stage could be, e.g., the first day a person was heard as an accused. 116/

74. The time period has later been held to begin at the "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence," 117/ and this definition

also "corresponds to the test whether the situation of the [suspect] has been affected". 118/ In the Ringeisen case, the European Commission took into consideration a time period between the first examination of the case and the moment of indictment. 119/

75. The relevant time period in criminal cases ends at the moment at which the accused becomes certain of his or her legal position. The period thus lasts at least until acquittal, dismissal or conviction, or until the sentence becomes definite, 120/ even if this decision is reached on appeal. 121/ In the Vallon case, the European Commission stated that the time period ended at the moment at which the accused was assumed to have been informed of the final verdict and its motivation. 122/

76. The European Commission has held that domestic authorities could in principle compensate an individual for excessive length of proceedings by reducing a sentence. 123/

77. In civil proceedings "reasonable time" begins to run on the day on which a plaintiff institutes action before a tribunal 124/ or submits a dispute. 125/ The "reasonable time" in civil proceedings extends until a tribunal has decided the dispute, including any appeals. 126/ A negotiation phase before the proceedings has not been included in the time period. 127/

78. The determination of reasonable time is subject to individual examination in each case and the time "must be judged not *in abstracto*, but in light of the particular circumstances in each case". 128/ Delays in judicial proceedings are viewed together and cumu'atively. 129/ The European Court and Commission consequently consider the particular circumstances in every case, focusing on the complexity of the case, the conduct of the applicant, and the conduct of the authorities. 130/ A fourth criterion was used by the European Court in the Bock case, namely the interest of the applicant at stake in the proceedings. 131/ The four criteria will be dealt with separately.

A. Complexity of the case

79. In the Neumeister case, the proceedings had lasted seven years. In spite of this period of time the European Court found no violation of article 6 (1) since the case was very complex and had many parties. 132/ Neither the complexity 133/ of a case nor the number of parties is a conclusive factor. 134/

80. In the Erkner and Hofauer case, 135/ the European Court found the issue in the case to be of considerable legal complexity. The case dealt with Austrian farmers who complained of consolidation proceedings taken regarding their land. The farmers argued that their right to a hearing within a "reasonable time" had been infringed. After 16 1/2 years the case was still pending.

81. The European Court noted that a "land consolidation is by its nature a complex process". 136/ The applicants could not be blamed for making full use of remedies available to them under domestic law. The European Court asserted that since the Austrian authorities had initiated the consolidation process, they were responsible for the conduct of it. The authorities had decided on a

provisional transfer of the land concerned, and they were accordingly under a special duty to act expeditiously. 137/ The European Court concluded that a number of delays were held attributable to the authorities dealing with the case, and that there had thus been a breach of article 6 (1). 138/

B. Conduct of the applicant

82. The European Court considers that the applicant is only required to show diligence in carrying out the procedural steps relating to him or her and to refrain from using delaying tactics. 139/ Delaying behaviour by the applicant may thus be taken into consideration by the European Court when determining "reasonable time". 140/ Any prolongation of the proceedings must also be "within reasonable time". 141/

83. In the Moreira de Azevedo case, the Portuguese Government argued that the applicant had not taken steps necessary to expedite the criminal proceedings and the applicant had further displayed passivity as to the promptness of the process. The European Court found that the applicant was under no duty to be more active. 142/ In fact, an individual is not required to cooperate actively with judicial authorities in connection with criminal proceedings. 143/

84. The Vernillo case 144/ dealt with an Italian couple who bought an apartment in France and whose contract was rescinded due to lack of payment. The applicants complained that the length of the civil proceedings, 7 1/2 years, exceeded the reasonable time requirement in article 6 (1). The European Court found that both the plaintiffs and the defendants (the applicants) in the case had prolonged the civil proceedings. The delays attributable to the French authorities were not "so long as to warrant the conclusion that the total duration was excessive". 145/ The European Court concluded that there had not been a breach of article 6 (1).

C. Conduct of the State

85. Only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement. 146/ Moreover, the European Convention imposes an obligation upon States to "organize their legal systems so as to comply with the requirements of article 6 (1)". 147/ The urgency of a case increases with time. If the expedient actions taken by the State are shown to be insufficient and the critical situation persists, the State must take even more efficient action to comply with the requirements of article 6 (1). 148/ Measures taken by Governments must be effective, 149/ and they must be taken in good faith. Measures taken too late cannot compensate for the fact that "reasonable time" has been exceeded. 150/

86. A State must be able to guarantee "reasonable time" even during a time of disruption of State institutions in a country, e.g., during a temporary political crisis. By ratifying the European Convention a State guarantees to "secure to everyone within [its] jurisdiction the rights and freedoms defined" in article 6 (1). 151/ In the Guincho case, the European Court applied the reasonable time requirements in situations of sudden and unforeseen increases in the volume of litigation. 152/ Even exceptional difficulties encountered by the Portuguese Government in the case were not such as to deprive the

applicant of his entitlement to a judicial determination within a "reasonable time". 153/ A time period of three years and ten months exceeded "reasonable time".

87. Similarly, in the Foti case, 154/ the European Court took notice of the extent of troubles facing a Government. Between 1970 and 1973 civil unrest took place in Reggio Calabria in Italy. Hundreds of people were arrested and about 1,200 people were charged with offences. The troubles resulted in an exceptional backlog of business in the courts. The European Court declared that a backlog in business as such could not justify a delay. 155/ In spite of the unusual situation the European Court found that the delays in proceedings, of which the shortest was three years and five months, were incompatible with article 6 (1).

88. The Buchholz case dealt with a German national who had been dismissed as a result of rationalization measures. 156/ The applicant contested the lawfulness of his dismissal in German labour courts. The applicant's complaint to the European Court concerned the length of the proceedings before the labour courts.

89. The German Government argued that the backlog of business in the domestic courts was a major reason for the delay in the proceedings. The European Court declared that a temporary accumulation of cases may be regarded as a justification of some delay, provided that the authorities do everything in their power to cope with the situation promptly. The Government had taken remedial action and was fully conscious of its responsibility under the Convention. The European Court concluded that there had not been a breach of article 6, in spite of the length of the proceedings (four years and nine months) since the applicant himself had to a large extent contributed to the delay.

90. In the Eckle case, a German businessman was subject to three separate prosecutions for economic crimes in different locations. 157/ The European Court held that the delay in the proceedings was "undoubtedly inordinate", 158/ and that under such circumstances it falls upon the respondent State to come forward with explanations. The principle ground of criticism in the applicant's submission was that the judicial authorities undertook three distinct sets of investigations and trial proceedings, instead of joining them.

91. The German Government submitted that domestic law compelled the authorities to proceed in the manner they did. The European Court found that the competent authorities had not acted with necessary diligence and expedition. The European Court declared that a Government may not "seek refuge behind the possible failings of [its] own domestic law" in relation to fulfilment of engagements undertaken by virtue of article 6. 159/

92. The European Court recognized the initial problems for the judicial authorities with prosecution of economic crime and that the legislative and administrative authorities had taken measures. The European Court concluded that it could not attach decisive weight to those factors for its ruling since "the state of affairs confronting the competent authorities was not at all exceptional". 160/ Article 6 (1) had thus been violated.

93. In the Zimmermann and Steiner case, 161/ Swiss tenants sought compensation from the Canton of Zurich for damages caused by the noise and air pollution resulting from the operation of a nearby airport. After the Federal Assessment Commission rejected the applicants' claims, the applicants lodged an administrative appeal with the Federal Court. The Federal Court had an excessive workload and the backlog of pending business meant that cases had to be sorted according to their urgency and importance. The Swiss Government argued that the parliament had taken the necessary steps to remedy the situation. The European Court asserted that if a State takes effective remedial action with the requisite promptness it can avoid international responsibility under the European Convention. 162/

94. The European Court found that although the Swiss Government had showed genuine willingness to tackle the problem, the steps taken were not found to "give sufficient weight to the structural aspects [of the problem] and [the measures] therefore only produced results that were not very satisfactory". 163/ A Government must take measures to avoid a permanent situation of violation of the European Convention. 164/ Hence, the measures were not enough and the difficulties encountered by the Federal Courts could no longer be considered to be temporary. The length of the proceedings, three years and six months, exceeded the "reasonable time" requirement.

95. In the Martins Moreira case, 165/ a Portuguese national who had been injured in a car accident instituted civil proceedings against the driver and the owner of the car. A Portuguese court ordered the defendants to pay damages to the applicant. The enforcement proceedings were still pending at the time the applicant lodged a complaint in the European Court.

96. According to the Portuguese Code of Civil Procedure, it is the responsibility of the parties to take the initiative with regard to the progress of proceedings. The European Court declared that the provision did not absolve the Portuguese courts from ensuring compliance with the requirement of article 6 (1) concerning reasonable time. 166/ The Court further held that Portugal could not seek to justify the excessive delay by noting that backlogs had become common in European countries. 167/

97. The European Court found that the competent authorities did not appear to have taken effective measures to remedy the excessive workload. The Portuguese Government argued that the duration of the proceedings should be compared with other member States of the Council of Europe and that such a comparison would undoubtedly be favourable to Portugal. The argument was rejected by the European Court, and the Court stated that acceptance of such a comparison "[c]ould lead to the acceptance of unsatisfactory practices if they are sufficiently general, whereas, according to the case law of the Court, the circumstances of each case must be taken into account and, in any event, compliance with article 6 (1) of the Convention must be ensured". 168/

98. The main delay in the case was caused by difficulties in obtaining an examination of the applicant by orthopedic experts. The European Court found it unreasonable that it took two years to carry out such an examination, and the Court further declared that only exceptional circumstances could justify such a delay. 169/

99. The Portuguese Government further argued that only the conduct of the judicial authorities could incur the international responsibility of Portugal, and not any errors on the part of the legislature, the executive, or organs or persons outside the State structure. The European Court did not accept the argument and declared that by ratifying the Convention, the Portuguese State had undertaken to respect the requirements of the Convention, and the State must ensure that all domestic authorities complied with the Convention. 170/ Consequently, the requirement of "reasonable time" affects all State institutions in a country. The European Court found that the length of the proceedings, eight years and three months, had violated the "reasonable time" requirement.

D. Interests at stake

100. The European Court and Commission have taken into consideration the special interests that may be involved for the applicant. In the Buchholz case, the European Court explicitly examined what was at stake for the applicant in the proceedings. The applicant had been dismissed from his employment and he challenged the legality of the dismissal. A favourable ruling in the litigation would have meant either reinstatement of his employment or an award of compensation. The European Court held that the great importance of the litigation to the applicant should be given special consideration in the determination of "reasonable time". 171/

101. In the Bock case, the European Court considered whether the applicant had suffered disadvantage from a delay. 172/ A German national had initiated divorce proceedings in a German regional court. His wife submitted that her husband lacked the mental capacity to conduct legal proceedings. The proceedings were delayed by the regional court's examination of the issue and the proceedings eventually lasted more than nine years.

102. German law provided that parties to matrimonial cases could take part in proceedings even where their legal capacity was found to be attenuated. 173/ The courts have a duty to investigate *ex officio* a petitioner's capacity to initiate proceedings. The European Court stated that the German courts had "unduly delayed" the proceedings, particularly through an excessive amount of activity focused on the petitioner's mental state. 174/ The European Court further asserted that particular diligence is required by competent authorities in cases concerning civil status and the capacity of individuals.

103. The European Court held that the applicant suffered for nine years from the doubts cast on the state of his mental health, an allegation which subsequently proved unfounded. This delay constituted a "serious encroachment on human dignity". 175/ The applicant's divorce petition was not heard within a "reasonable time" owing to the cumulative delays which were attributable to the competent courts. Article 6 (1) had been violated.

104. In H. v. United Kingdom, 176/ the European Court examined the length of proceedings instituted by the applicant regarding access to her child, which was in the care of local authorities. The proceedings were of great importance to the applicant and they had a quality of irreversibility. A decision in the matter would be decisive for the applicant's future relation with her child. The Court found that exceptional diligence was to be expected on the part of the authorities, due to the nature of the case.

V. RIGHT TO COUNSEL

105. Article 6 (3) (c) of the European Convention provides that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

106. The purpose of the right to counsel is "to ensure that both sides are actually heard by giving the accused as necessary the assistance of an independent professional". 177/

107. The European Court has held that if a disciplinary proceeding is similar to the determination of a criminal charge, the defendant has the right to counsel. 178/

108. The right to a lawyer generally applies to all stages of the criminal proceeding, but is most important at the fact-finding stage and during the trial. 179/ The European Commission has stated that member States must allow representation of a defendant during the preliminary investigation if the principal taking of evidence occurs at that stage, and if there is little opportunity for the defendant to challenge the evidence at trial. 180/ If a domestic legal system has guarantees for evaluating evidence, including confessions, a lawyer's presence may not be necessary. 181/

109. Article 6 (3) (c) generally applies to appeals proceedings. The provisions do apply if the domestic law of a State provides for proceedings on appeal. 182/

110. Although article 6 (3) (c) applies only to defendants in criminal proceedings, the Court and Commission have recognized that individuals have the right to consult counsel when instituting civil proceedings. 183/

A. Limitations on the right to choose counsel

111. An accused individual's right to choose counsel is subject to limitations and an accused merely has the right to have someone representing him or her. The defendant's right to choose counsel is further limited by the Government's right to regulate lawyers and by the obligation on defence counsel to obey certain professional principles of ethics. 184/

112. The European Convention does not guarantee the accused the right to an unlimited number of defence lawyers. Hence, courts may limit the number of counsel who may appear on behalf of the accused, provided that this limit applies to the prosecution as well. 185/

113. A domestic court may prohibit representation by a counsel who is the subject of criminal proceedings 186/ or who has violated rules of professional ethics. 187/ In Ensslin, Baader, Raspe v. Federal Republic of Germany, 188/ the lawyers chosen by the defendants were refused permission to appear in court because they were suspected of complicity in the defendants' criminal acts. The European Commission declared that States may exclude lawyers in such circumstances. A court may further require the defendant to choose another defence counsel solely on the basis that the defendant's chosen counsel shows disrespect to the court. 189/

114. A court may refuse to allow representation by a lawyer who refuses to follow court procedure. In X. v. Federal Republic of Germany, the domestic court replaced a defendant's chosen counsel because the chosen counsel "refused to wear robes". Although the defendant complained that the appointed counsel was not well prepared, the European Commission found no violation of the right to counsel because the domestic court had the right to enforce court procedures. 190/ It is unclear whether a court can appoint counsel for the defendant if the defendant already has hired a lawyer.

B. Self-representation

115. Defendants do not have an absolute right to represent themselves at trial. The court will decide whether to allow defendants to represent themselves, and it has the right to refuse defendants' requests for self-representation. A domestic court may not require defendants to represent themselves at trial. 191/ A decision of self-representation must follow applicable domestic legislation and rules of court of the State. 192/ If a defendant's request for self-representation is denied, the court must provide the defendant with legal representation, if necessary (i.e. if the defendant does not then select an attorney). 193/

116. Defendants who represent themselves at trial do not have the right to reimbursement for costs of defending themselves. 194/ In one case the defendant, who was a lawyer by profession, argued that the article 6 (3) (c) provision on free legal aid entitled him to reimbursement from the Government because he had represented himself. The European Commission dismissed the argument and stated that the lawyer's case had nothing to do with the grant of free legal aid.

117. The defendant in X. v. Norway 195/ argued against the trial court's decision to deny him the right to defend himself without legal assistance. The defendant argued that this refusal undermined his defence because the court-appointed lawyer did not call a particular witness. The Norwegian Supreme Court held that the appearance of the witness was unimportant to the outcome of the case. Noting the Supreme Court decision, the Commission found that there was no appearance of a violation of the right to counsel, and held the application "ill-founded."

C. Right to confer with counsel

118. A fair trial requires that the State must ensure that the accused has the opportunity to consult with counsel, and that counsel represents the accused at trial. Such opportunity for consultation may or may not require actual meeting(s) with counsel. 196/

119. In M. v. United Kingdom, 197/ the applicant complained that the counsel appointed for his appeal proceedings did not meet with the applicant. The counsel had advised the defendant that grounds for appeal were lacking and had turned over the case file to another, newly appointed, counsel. The European Commission found no violation of article 6 (3) (c) because the accused was given sufficient opportunity to consult with counsel regarding grounds for appeal.

120. The European Convention allows States to put limits on the defendant's right to confer with counsel. For example, the European Commission has held that a domestic court restriction prohibiting defence counsel from revealing the identity of an *in camera* witness to the defendant did not violate the defendant's rights. 198/

D. Effectiveness of counsel

121. It is not enough for a State to appoint counsel for indigent defendants. The State must also provide effective defence counsel. The State has an obligation to see that the appointed counsel is carrying out his or her duties. Authorities must, if necessary, supervise appointed counsel, replace the person or cause him or her to fulfil his or her duties adequately. 199/

122. In the Artico case, the defendant's court-appointed counsel was out of the country part of the time, and upon returning was unable to help the defendant because of time constraints and health problems. Despite numerous complaints from the defendant, the Italian court refused to appoint another counsel. The European Court and Commission held that the Italian court should have appointed another lawyer. 200/

123. The Italian Government argued that for there to be a violation of article 6 (3) (c) the lack of assistance must have actually prejudiced the person charged with a criminal offence. The European Court pointed out that the Italian Government was asking for the impossible since it could not be proved beyond all doubt what would have happened with another counsel. The Court found it plausible that the result would have been better for the defendant and further declared that there is nothing in article 6 (3) (c) that indicates that proof beyond doubt is necessary. A violation of the article was conceivable even in the absence of prejudice. The Italian authorities should have taken steps to ensure that the applicant had the right to effective counsel; remaining passive, they had breached article 6 (3) (c).

124. Hence, a defendant who alleges that his court-appointed counsel was ineffective need not show that he suffered an actual disadvantage at trial. An accused has an absolute right to an effective defence. 201/ The court must

notify the defence counsel of the date of trial. Even if the State notifies the defendant, but not the defence counsel, the State violates article 6 (3) (c) if it proceeds with the trial without the presence of the accused or the defence counsel.

125. In the Goddi case, 202/ an Italian appeals court had held a hearing in the absence of the defendant and the defence counsel. Although the domestic court had appointed new counsel, that counsel was not given sufficient time to prepare. The European Court criticized the domestic court for remaining passive and stated that the court should have adjourned or suspended its proceedings to give the new lawyer time to prepare.

126. A State is not responsible for every shortcoming of a lawyer appointed to defend an indigent defendant. In the Kamasinski case, 203/ the European Court noted that the State is only responsible for shortcomings that are manifest or sufficiently brought to the attention of competent authorities. Moreover, the European Court concluded that non-attendance of counsel at the indictment hearing, the brevity of the counsel's pre-trial visits to the defendant and failure to follow the defendant's instructions during the trial did not constitute ineffective legal assistance. Additionally, the European Convention does not guarantee the accused the right to have his counsel adopt a certain defence if the counsel thinks the defence is untenable. 204/

E. Free legal assistance

127. The European Convention requires States to provide free legal assistance when the defendant does not have sufficient means to pay for legal assistance and when "the interests of justice so require". The European Court has emphasized that member States have an active obligation not only to provide legal counsel but to provide effective legal counsel.

128. In the Artico case, 205/ the domestic Court refused to replace the court-appointed legal counsel despite complaints from the defendant that the counsel was not performing his duties. The European Court noted that member States have an obligation to set up a system to provide effective legal counsel for indigent defendants.

129. The European Convention guarantees the right to free legal assistance only when a defendant lacks sufficient means to pay for counsel. The European Court and Commission have discussed this issue in only a few cases. 206/ The Court and Commission provided few standards for determining "sufficient means".

130. Generally, if domestic law provides standards for granting legal aid and if the defendant meets those standards, the domestic courts must follow the laws. 207/ The European Commission has held that a State may require a defendant to reimburse legal aid fees if the defendant at that time has sufficient means to pay the legal fees. 208/

131. The European Convention also guarantees free legal assistance when "the interests of justice so require". Under this provision, a State could deny free legal aid to an accused if the interests of justice did not require a lawyer to be appointed. Generally, if domestic law provides standards for granting legal aid and if the defendant meets those standards, the State must follow its own law. 209/

132. In the Pakelli case, 210/ the Turkish defendant, living in Turkey at the time of his appeal, claimed that he was unable to return to Germany to represent himself because he did not have a German residence permit and he could not afford to pay an interpreter. The European Court rejected the German Government's argument that the defendant was free to return to Germany to defend himself. The Court held that a State may not deny defendant's application for free legal aid solely on the grounds that the defendant had an opportunity to appear at trial and represent himself. If a defendant cannot or does not wish to represent himself, the State must appoint counsel, provided that the defendant lacks sufficient means to pay for an attorney and if the interests of justice so require.

133. The European Court examined whether the "interests of justice" required that Mr. Pakelli be given free legal assistance. The Court held that it was necessary for the proceedings that he should appear before the domestic court, assisted by a counsel. He would thus have been able to explain his complaints, supply further information and develop his argument. Without legal assistance, Mr. Pakelli was not able to intervene in the proceedings. The Court stated: "By refusing to provide him with a defence counsel, the Federal Court deprived him, during the oral stage of the proceedings, of the opportunity of influencing the outcome of the case." 211/

134. The application of article 6 (3) (c) depends on the proceedings involved as well as on the structure of the entire legal system and the role of the appellate courts in that system. 212/ Hence, the European Court and Commission have permitted States to deny free legal assistance at both the criminal trial and later proceedings depending on the circumstances of the case and on the structure of the domestic legal system. 213/ The European Commission generally finds no right to legal aid if the domestic court has denied both the prosecution and the defence the right to appear, for example, in appeals proceedings. 214/

135. The European Commission has based findings of denial of free legal assistance on the defendant's ability to defend himself and on the simplicity of the case. 215/ In some cases, the Commission found that appointment of a lawyer was unnecessary because the proceedings did not require the services of a lawyer. For example, the Commission rejected the application of a defendant who was refused free legal aid during appeal proceedings because at the time of the request, the defendant's supporting arguments already had been submitted to the appeals court and the time limit for submitting further arguments had expired.

136. The European Commission also dismissed the application of a defendant who was denied legal aid in submitting grounds for appeal and was not allowed to be present at the appeal proceedings. The Commission found no violation because the appeals court was basing its decision only on the trial record and on the grounds of appeal. Moreover, neither the prosecution nor the defence was allowed to be present at the appeals proceedings. 216/

137. Defendants who are receiving free legal aid have no right to choose their counsel. 217/ Moreover, such defendants have no right to be consulted with regard to the choice of appointed defence counsel. 218/

138. In the Quaranta case, 219/ the applicant was charged with offences under the Swiss Federal Misuse of Drugs Act. Mr. Quaranta applied several times to be given free legal assistance but the president of the criminal court dismissed his application. The European Court examined whether the Swiss authorities had violated article 6 (3) (c) by denying the applicant free legal assistance. The Swiss Government contended that the right to free legal assistance was not absolute, but dependent on the assessment of all the circumstances of the case and that the right was further subject to a number of conditions under domestic law.

139. The European Court noted that States enjoy considerable freedom in the choice of the means of ensuring that their legal system satisfies the requirements of article 6. The European Court considered several factors when determining whether the "interests of justice" required that the applicant should receive free legal assistance. Consideration should be given to the seriousness of the offence of which the applicant was accused and the severity of the sentence which he risked. The maximum sentence was three years' imprisonment. The applicant also faced the possibility of activation of a suspended sentence because the alleged offence had occurred during a probation period. The complexity of the case was found to be an additional factor.

140. "The participation of a lawyer at the trial would have created the best conditions for the accused's defence, in particular in view of the fact that a wide range of measures were available for the [domestic] Court." 220/ The "interests of justice" required that the applicant should be given free legal assistance. The applicant had not been able to present his case in an adequate manner and the Swiss authorities were found to have violated article 6 (3) (c).

VI. RIGHT TO ADEQUATE TIME AND FACILITIES FOR THE DEFENCE

141. Article 6 (3) (b) guarantees everyone charged with a criminal offence the right "to have adequate time and facilities for preparation of his defence".

142. The purpose of article 6 (3) (b) is to protect the accused against a hasty trial in which he or she does not have access to all the documents in the case under the same conditions as the prosecution. 221/

143. The European Commission has asserted that "in order to determine whether the right to have adequate time and facilities for the preparation of the defence has been respected, account must be taken of the general situation of the defence". 222/

144. Even if time and facilities were inadequate, the European Commission previously took into account the absence of prejudice from such inadequacies. More recently, the Court, in the Eckle case and in S. v. Switzerland, has held that a person can be a victim of a violation of the Convention without suffering prejudice. 223/

145. In X. and Y. v. Austria, 224/ the European Commission held that the right to adequate time and facilities could only be invoked by a person charged with a criminal offence. The defence counsel could not be a party claiming violation of rights under article 6 (3) (b).

146. Although only the accused can claim the right to adequate time and facilities, the European Commission will consider whether the State provided adequate time and facilities to the defence as a whole. 225/ Consequently, article 6 (3) (b) is satisfied if a State provides adequate time and facilities for case preparation either to the defendant or to the defence counsel. 226/ For example, a defendant complained of prejudice to his case because he was not permitted to take notes from his case file. 227/ The Commission held that the authorities had provided the defendant's lawyer with adequate access to the case file and thus the defendant's lack of access to the file was irrelevant. 228/

A. Adequate time

147. The European Court and Commission have looked at the nature of the proceedings and the factual circumstances of the case in determining whether article 6 (3) (b) has been violated. 229/ The Commission has assessed the time necessary for preparation of the defence on a different basis at various stages of the proceedings. 230/

148. For example, when lodging an appeal or a plea of nullity, the defendant generally is already aware of the contents of the prosecution's file, of the nature of the charges and of the evidence on which the prosecution is relying. Consequently, the European Commission has held that in such cases, the domestic courts can grant the accused a very short preparation time. 231/ If the particular facts of a case are very complicated, the European Commission has stated that it may find a longer preparation time necessary, even in cases involving appeals or pleas of nullity. 232/ Moreover, if the defence counsel has stated that there was sufficient time to prepare the defence, the European Commission would be even more reluctant to find otherwise. 233/

149. In X. v. Belgium, 234/ the applicant complained that he had only had one month to prepare his appeal even though a domestic statute required the State to give him two months to prepare. The European Commission noted that because the defendant was making a plea of nullity, the only grounds on which the Court of Cassation could have found in his favour were violation of the law and defects of procedure, and thus the defence needed very little time to prepare. The European Commission found no violation of article 6 (3) (b).

150. In X. and Y. v. Austria, 235/ the European Commission considered that in a fairly complicated case "the task of the defence" could have been accomplished in the available ten days, including six working days, between the summons and the date of the trial. The domestic court considered that the trial should be held at the earliest possible date to alleviate the psychological strain of the accused. The preparation time was thus exceptionally short but the European Commission found that the time period was sufficient under the circumstances. The Commission took into account the complexity of the case and the usual workload of a counsel. It was not unreasonable to require a defence counsel to "arrange at least some shifts in the emphasis of his work if this is necessary in view of the special urgency of the particular case". 236/

151. The Commission has noted that a defence counsel's submission of detailed briefs to a domestic court shows that the defence has had adequate time to prepare. 237/

152. In addition, if a State does not adequately notify a defendant or the defence counsel of the proper charges, such lack of notification could violate article 6 (3) (b). 238/ In Ofner v. Austria, the defendant complained because although he was indicted for fraud, the domestic court convicted him of misappropriation, a separate offence. The Commission found that lack of notification of the misappropriation charge at the indictment stage did not hamper the defence because the defendant was aware, before and during the trial, of the misappropriation charge and thus was able to prepare a defence to the charge. Hence, no violation of article 6 (3) (b) had occurred.

153. In X. v. Austria, 239/ the defendant was notified about his court-appointed lawyer three months after his arrest only to be informed the next day of a change in lawyers. The defendant was unable to meet with that lawyer until a minute before trial and was sentenced to five years of severe imprisonment. The Commission found no violation of article 6 (3) (b) because the defendant was unable to show any prejudice to his case as a result of the lawyer's lack of preparation. 240/

B. Adequate facilities

154. Most complaints about a lack of adequate facilities focus on lack of adequate contact with an attorney 241/ or of lack of access to the prosecution's case file. The European Commission has interpreted "adequate facilities" as facilities which "assist or may assist [the accused] in the preparation of his [or her] defence". 242/ The European Court and the Commission have found inadequate facilities in only a few cases. 243/

155. In the Campbell and Fell case, 244/ the applicants were not provided with attorneys for a prison hearing that involved a criminal offence. The Court held that a lack of legal aid constituted a lack of adequate facilities for the defence.

156. Article 6 (3) of the European Convention "does not expressly guarantee the right of an accused to communicate with a lawyer of his own choosing". 245/ Such a right may, however, be inferred from the article. "The possibility for an accused to communicate with his lawyer is a fundamental part of the preparation of his defence." 246/

157. In Kröcher and Möller v. Switzerland, 247/ the defendants complained that after their arrests, they were in solitary confinement for three weeks during which they could not visit with their attorneys. During the next six months visits were allowed, but were restricted to hour-long, twice-weekly visits. Moreover, they complained that, during the meetings, the attorneys were not allowed to use tape recorders and were separated from the prisoners by a pane of glass.

158. The European Commission found that the restriction on visits from attorneys during solitary confinement was not such as to hinder seriously the preparation of the applicants' defence since they were allowed to correspond with the attorneys and they were later able to have face-to-face meetings in the nine months preceding the trial. In addition, the European Commission found that the other restrictions did not significantly affect the applicants' right of proper preparation of the defence, and thus no violation had occurred.

159. In Bonzi v. Switzerland, 248/ the applicant was put into solitary confinement for a month after his arrest. The applicant complained that the Swiss authorities had refused to allow him to confer in person with his defence counsel during his solitary confinement. The applicant had been allowed to write letters to his counsel. After being released, the defendant had nine months to prepare his case and to meet with counsel.

160. The European Commission held that during the nine months the applicant had sufficient contact with his defence counsel to prepare his defence. The Commission also examined whether the solitary confinement in itself contravened article 6 (3) (b). The Commission found that it could not be maintained that "the right implicitly guaranteed ... to confer with one's counsel and exchange confidential instructions or information with him is subject to no restrictions whatsoever". 249/ The applicant had been free to inform his counsel in writing and he could further have requested a relaxation of his isolation that would have allowed visits from his counsel. The European Commission concluded that the relative and temporary limitations of the contacts did not constitute a refusal of necessary facilities for the preparation of the applicant's defence.

161. Kurup v. Denmark 250/ also dealt with restrictions on the communication between the accused and the counsel. The Danish authorities prohibited a defence counsel from revealing the identity of a witness giving *in camera* testimony but allowed discussion of the substance of the testimony. The European Commission held that the restriction did not violate article 6 (3) (b) because the domestic court was justified in protecting the witness, who feared reprisal from the defendant, and because the defence counsel was allowed to discuss the substance of the testimony with the applicant.

162. In addition to complaints about inadequate contacts with defence counsel, the European Commission has also examined complaints from applicants who allegedly were denied proper materials for self-defence. In Ross v. the United Kingdom, 251/ the applicant argued that British prison authorities had not provided him with all the legal reference works requested. The European Commission found that the British authorities had taken reasonable steps to find materials for the prisoner's research and that failure to provide some of the materials had not prevented the prisoner from being able to argue his points at the appellate hearing.

163. Under certain circumstances, article 6 (3) (b) may imply a right of reasonable access to the prosecution's files. 252/ Defendants have a right to all relevant information held by the prosecution that could help them exonerate themselves or to reduce their sentences, and often this information will be in the prosecution's files. 253/ As long as the defendant's laywer has access to the files, however, it is not necessary that the accused also have access. 254/ Although the prosecution may have to provide reasonable access to its files to the defence counsel, the prosecution has no obligation to give defence counsel notice of all evidence it intends to present at trial. 255/

164. The European Commission has found that a State may put reasonable restrictions on access to prosecution files. In Haase v. Federal Republic of Germany, 256/ a defendant accused of military espionage complained that his defence had insufficient access to the prosecution's files. The European Commission, without describing the limits placed on the files, held that the German Government had provided adequate access to the files and that the limits were justified because of concerns about national security.

VII. RIGHT TO AN INTERPRETER

165. Article 6 (3) (e) provides that defendants charged with criminal offences have the right to the free assistance of interpreters if they cannot understand or speak the language used in court.

166. Only a person charged with a criminal offence has the right to the free assistance of an interpreter. For example, a German-speaking plaintiff complained that because his native tongue was Slovene, the Austrian trial court violated the European Convention by refusing to accept a petition written in Slovene and by refusing to conduct the proceedings in Slovene. 257/ The European Commission noted that the applicant could not claim the article 6 (3) (e) right because he was a plaintiff and not a defendant.

167. Similarly, the European Commission dismissed the application of two parents who complained that they were unable to understand the proceedings during a trial of a defendant accused of killing their daughter in a car accident. The Commission held that they could not claim the right to have the proceedings in their language because they were not charged with a criminal offence. 258/

168. Defendants have the right to an interpreter at all stages of the proceedings against them, including pre-trial proceedings. 259/ The Commission probably would not find a violation of this provision unless a defendant actually requested an interpreter and then was refused. Defendants who have not requested an interpreter cannot later claim that a court denied them the free assistance of an interpreter. 260/ Once a defendant has requested an interpreter, authorities must provide one.

169. Moreover, the European Court has noted that if the defendant complains about the interpreter, authorities must take steps to ensure that the interpreter is effective. In the Kamasinski Case, 261/ the defendant, a United States national, complained that the interpreter was not proficient in English. The Court found, however, that Kamasinski appeared to have understood the trial and that there was no evidence that the interpreters were deficient in their duties.

170. The right to an interpreter is not limited to having an interpreter present at the oral hearing. The European Court, in the Luedicke, Belkacem and Koc case, held that this right extends to the assistance of an interpreter for the translation or interpretation of all documents or statements that are necessary for the defendant to understand for the purposes of a fair trial. 262/ A defendant does not, however, have the right to obtain written translations of documents. Oral translations are sufficient. 263/

171. A defendant does not have the right to translation or interpretation of all documents. For example, a defendant does not have the right to translation of all the court files on his case. 264/ In X. v. Austria, the European Commission noted that the defence counsel, who understood the court language, was able to read and understand the court files and thus was able to assist in the defence. Hence, no violation of article 6 (3) (e) had occurred.

172. The Commission has stated that the right to an interpreter applies only to contacts between the accused and the court. The Commission has not yet assured the right to free assistance of an interpreter for communications between the defendant and defence counsel. 265/ In X. v. Austria, the applicant, who understood only Italian and French, complained that he was unable to understand his attorney, who spoke no Italian or French. The Austrian courts had refused his application for an interpreter for communications with his counsel.

173. The European Commission held the applicant responsible for his situation. They noted that he could have chosen another attorney who spoke Italian or French and that he could have applied for free legal aid. Moreover, the Commission held that the right to an interpreter applied only to communications with the court. The Commission did not comment on whether an interpreter would have been required if the defendant had tried to find a counsel who spoke Italian and French but had not been successful.

174. The right to free assistance of an interpreter is absolute, regardless of whether the court convicts the defendant. 266/ In the Luedicke, Belkacem and Koc case, the European Court held that even if a defendant is convicted, the Government may not require the defendant to reimburse the costs of

interpretation. 267/ In this case, the three defendants received the free assistance of interpreters during proceedings in the German courts. After convicting the defendants the German courts ordered them to pay the costs of interpretation. The domestic courts had held that article 6 (3) (e) only required the free assistance of an interpreter during the trial but did not prevent domestic courts from assessing convicted defendants for the costs of interpretation.

175. The European Court found these orders to be violations of article 6 (3) (e) because the guarantee of free assistance is an absolute and permanent one. A defendant has the permanent right to be absolved of liability for costs of an interpreter. The European Court noted that, without such an absolute guarantee of free assistance, a fair trial might not take place because the fear of having to pay for an interpreter could influence defendants to waive their right to an interpreter.

176. In addition, article 6 (3) (a) and 6 (3) (e) do not establish a general right of "linguistic freedom" - for example to have children educated in their mother tongue. 268/

VIII. RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW

177. Article 6 (1) guarantees a hearing by an independent and impartial tribunal established by law. The European Court has stated that the word "tribunal" does not necessarily have to be understood as a court of law of the classic kind. 269/ The Court has described a "tribunal" as a body with judicial functions set up to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. 270/

178. To qualify as a "tribunal" the body must satisfy a series of requirements such as: independence from the executive and the parties to the proceedings; 271/ manner of appointment and duration of its members' term of office; 272/ existence of guarantees afforded by its procedure; 273/ and finally, impartiality. The different criteria required will be discussed separately.

A. Independence from the executive

179. The executive organ in a State must not be able to interfere in a tribunal's proceedings and a tribunal must not act as an agent for the Government against an individual citizen.

180. In the Delcourt case, 274/ the European Court discussed the presence of a member of the Belgian Procureur General's department at criminal proceedings and whether such a person was sufficiently independent of the executive [Minister of Justice]. The Procureur General's department assists and advises courts in the exercise of their functions. It does not deal with the establishment of guilt or innocence of the accused. The department does not ordinarily conduct prosecutions and it does not have the character of a party to the proceedings. In almost all cases it functions wholly independently of the Minister of Justice and the Minister has no power to compel the

Procureur General to make his submissions one way or the other. At the appellate level, the Procureur General does not give any instructions or injunctions, nor is he or she entitled to instigate or prevent the institution of prosecution before the lower courts. The Procureur General is not an adversary of the accused and he does not have the character of a public accuser. In the appellate court, he or she upholds the observance of the law by supervising the lawfulness of decisions and by ensuring the uniformity of judicial precedents. He or she is not concerned with the establishment of the guilt or innocence of the accused. The European Court found that the independence of the appellate court could not be adversely affected by the presence of a member of the Procureur General's department at its deliberations.

181. In Borgers v. Belgium, the European Court reaffirmed its findings in Delcourt regarding the independence and impartiality of the Belgian Procureur General's department and the Court of Cassation. The European Court, however, noted that the principle of equality of arms had undergone considerable evolution and had been breached in a case essentially identical to Delcourt in which the accused had not enjoyed an opportunity to reply to the submissions made by the Procureur General's department and the department's representative had attended the court's deliberations. 275/

182. In the Lithgow case, 276/ the applicants had their interests as shareholders nationalized by the United Kingdom under the Aircraft and Shipbuilding Industries Act of 1977. The applicants questioned whether the Arbitration Tribunal met the requirements of article 6 (1) regarding independence from the executive. The Minister representing the executive was a party to the proceedings and had appointed two members to the Tribunal.

183. A nomination of members made by the Minister required prior consultations with the stockholders' representative. The stockholders' representative was "appointed by and represented the interests of all the holders of securities of the company concerned and thus the interests of each individual shareholder were safeguarded, albeit indirectly". 277/ The requirement of consultation led the European Court to conclude that the Arbitration Tribunal was independent from the executive.

184. The case of Ettl v. Austria 278/ dealt with the determination of property rights in connection with a land consolidation reform before the Provincial Land Reform Board, a tribunal that the applicant alleged fell short of the requirements for an independent tribunal. The provincial Board was composed of three judges and five civil servants from the local government. The applicant argued that the civil servants were in a hierarchical relationship with one another and furthermore that three of them sat as experts while the other two occupied the key positions of chairman and rapporteur. The opinion of the civil servants would thus have great impact on the tribunal's final decision.

185. The European Court stated that the fact that the civil servants sat on the tribunal concerned, and even constituted a majority, did not in itself contravene article 6 (1) of the European Convention. Public authorities were prohibited from giving them any instructions concerning their judicial

duties. The Court pointed out that the case did not involve the local or federal governments as parties. 279/ The civil servants sitting on the tribunal were experts in their fields, and such experts are necessary in land consolidation cases. The hierarchical links betwen civil servants from the same governmental divisions were of no consequence in the case. The European Court held that the tribunal fulfilled the requirement of independence. 280/

B. Independence from the parties

186. In the Sramek case, 281/ the European Court examined whether a tribunal was independent from the parties in the case. Ms. Sramek wished to build a holiday residence in Austria and she negotiated the purchase of a plot. The contract could not take effect unless it was approved by the Regional Real Property Transaction Authority, which can be regarded as a tribunal in the sense of article 6 of the European Convention. The applicant was refused approval. The Regional Authority was composed of both non-civil servants and civil servants. The local government was prevented by law from giving the civil servants instructions in their judicial functions. The local government was represented by a Transaction Officer in the Regional Authority, who acquired the status of a party when the local government appealed the case. One of the civil servants who was a member of the tribunal had the Transaction Officer as his hierarchical superior. The civil servant also occupied a key position in the Regional Authority.

187. Even if there was nothing that indicated that the Transaction Officer had taken advantage of his hierarchical position, or that he would have given instructions to the civil servant, the European Court considered the situation to be unsatisfactory. Litigants could have a legitimate doubt as to the independence of the Regional Authority. 282/ The Court found that the tribunal might have lacked sufficient independence.

C. Manner of appointment of tribunal members

188. Appointment for life has not been regarded as necessary by the European Court and Commission, provided that the members of a tribunal cannot be discharged by the authorities at will or on improper grounds. 283/

189. In the Zand v. Austria case 284/ a tribunal was held to be independent in spite of the fact that a government official, the Minister of Justice, had wide discretion in establishing and abolishing the tribunal and in choosing who would serve on it. The European Commission held that independence of the tribunal was to be assumed as long as the facts did not show that the official acted "unsatisfactorily" or with improper motives. The mere possibility that the Minister could abolish the tribunal was not sufficient to warrant a finding that the tribunal's independence was generally affected.

D. Duration of term of office

190. The irremovability of judges has been found to be "a necessary corollary of their independence". 285/ "[I]t is essential that [a judge] should enjoy a certain stability, if only for a specified period, and that [he or she] should not be subject to any authority in the performance of [his or her] duties as a judge." 286/

191. In the Campbell and Fell case, 287/ the European Court examined whether the duration of the term of office affected the tribunal's independence. The tribunal members' term of office was relatively short (three years). The European Court held that a short term of office was justifiable in this case since the members were not paid for their services, and since it would be difficult to secure willing and suitable volunteers to fill the positions if the period were longer. The Court thus concluded that the tribunal was sufficiently independent within the meaning of article 6 (1). 288/

E. Guarantees against outside pressure

192. Protection against removal from office can be seen as a guarantee against outside pressure. The European Commission has stated that the irremovability of judges during their term of office is "a necessary corollary of their independence" and that this is included in the guarantees of article 6 (1) of the Convention. 289/

193. The European Commission stated in the Sutter case that a judge in a military court could be held to be sufficiently independent, in spite of his "hierarchical dependence" as a member of the military, since nothing indicated that he could be dismissed from office. Although the judges were subject to the authority of superiors, they were not answerable to anyone about the way in which they administered justice. 290/

194. In X. v. Sweden, 291/ the European Commission discussed whether assistant judges were sufficiently independent within the meaning of the European Convention. The Commission noted that assistant judges "do not benefit from the same protection given to holders of permanent judgeships by ... the Swedish Constitution. However, the Commission is satisfied that assistant judges belong to the judicial profession and ... act in full independence". 292/ Although assistant judges could be removed in exceptional circumstances, they could appeal their dismissal to the Swedish Supreme Administrative Court. They were thus regarded as sufficiently independent.

F. Appearance of independence

195. In the Belilos case, 293/ the applicant, a Swiss student, had taken part in a demonstration for which a permission had not been sought, and she was fined by the municipal Lausanne Police Board. The applicant claimed that the Police Board which heard the criminal application contravened article 6 (1). Her major complaint was that the Police Board, which consisted of a single member, was subordinate to the police authorities and thus could not have been an independent tribunal.

196. The European Court stated several reasons why the Police Board could arguably be sufficiently independent from the authorities, namely: an appointed member was a municipal servant but sat on the tribunal in a personal capacity and was not subject to orders in the exercise of his or her powers, the member took a different oath from the one taken by police officers, and in principle the member could not be dismissed during his or her term of office.

197. The European Court asserted that the appearance of the Police Board was of relevance. The single member of the Police Board was a senior civil servant who was liable to return to other departmental duties, and the ordinary citizen would tend to see him or her as a member of the police force subordinate to his or her superiors. The Court declared that situations like this "may undermine the confidence which must be inspired by the courts in a democratic society" 294/ and the applicant could legitimately have had doubts as to the independence of the Police Board. The Police Board did not satisfy the requirement of article 6 (1).

198. In the Delcourt case, the Court noted that while "the long standing [150 years] of a national rule cannot justify a failure to comply" with the Convention, the system "appears never to have been put in question by the legal profession or public opinion in Belgium". 295/ The tribunal had appeared independent.

G. Impartial tribunal

199. A tribunal hearing a case should not only be independent but impartial as well. Impartiality in this connection means that a tribunal will base its opinion only on objective arguments, and that it will not allow itself to be influenced by subjective arguments and personal emotions. An applicant's fear of being subject to the decision of a partial tribunal is of relevance, but the decisive factor must be whether such a fear can be objectively justified. 296/

200. The European Court and Commission use both an objective and a subjective test when determining whether a tribunal is impartial. 297/ The objective test is applied strictly while the subjective test is applied less strictly. 298/

201. The objective test examines whether there are any ascertainable facts, apart from the judge's personal conduct, that raise doubts about the judge's impartiality. 299/ Facts to consider are, e.g. the way in which a tribunal is composed and organized.

202. In the Piersack case, 300/ a judge, Mr. Van de Walle, presiding over an appellate court had previously served as senior deputy in the public prosecutor's department. The European Court first stated that the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that the person lacks impartiality. 301/

203. The European Court found that it was not enough to examine whether Mr. Van de Walle had previously intervened in the case in the public prosecutor's department. The question of internal organization had to be taken into account as well. The judge presiding in the appellate court enjoyed extensive powers during the hearings and the deliberations. His position in the public prosecutor's department had also been influential. "If an individual, after holding in the public prosecutor's department an office whose nature is such that the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality." 302/ The European Court held that it was not necessary to gauge the precise extent of the role Mr. Van de Walle had played in the case. It was sufficient to find that the impartiality of the tribunal was "capable of appearing open to doubt". 303/

204. The European Court held in the De Cubber case that the trial judge's active participation in the preparatory investigation of a case raised doubts about his impartiality. 304/ As an investigatory judge, the judge had ordered the applicant to be placed in detention on remand. He had further interrogated the applicant on numerous occasions during the preparatory investigation. The same person was later appointed as trial judge and as such conducted the trial in the same case.

205. The investigational stage of the proceedings was secret and it was not conducted in the presence of both parties. Under Belgian law, an investigation judge has the status of an officer of the criminal investigation police and, as such, he is placed under supervision of the authorities. The European Court found the preparatory investigation to be inquisitorial in nature, and an accused could justifiably have some doubts about the trial judge's position.

206. After an objective examination of the case, the European Court came to the conclusion that the impartiality of the trial court could be questioned by the applicant. The Court distinguished three factors of relevance, namely: (a) the trial judge's position in the proceedings enable him to play a crucial role in the trial court; (b) the judge may have a pre-formed opinion which was liable to weigh heavily in the balance at the moment of decision; 305/ and (c) the trial court may have to review the lawfulness of measures taken by the investigatory judge. 306/

207. In the Ben Yaacoub case, 307/ a person was sentenced by a court presided over by a judge who had previously ordered continued pre-trial detention in the same case and had committed the person for trial. The European Commission considered that during the previous proceedings the judge had acquired detailed knowledge of the case and of the personality of the accused. There was a definite risk that the judge had formed a preconceived opinion as to whether or not the accused was guilty. The accused would thus seem "justified in thinking and fearing that the judge, who had refused to release him and had ordered his committal to trial, would come to the trial with an unfavourable, preconceived opinion regarding him". 308/ Mr. Ben Yaacoub had not been heard by an impartial tribunal, according to the European Commission.

208. The Hauschildt case dealt with a similar situation. A trial judge had made a pre-trial decision concerning continuation of the accused's detention. The judge was entrusted with a supervisory role in the investigation process. The applicant argued that the kind of decisions the judge would be called upon to make at the pre-trial stage required him to assess the strength of the evidence and the character of the accused. The judge would thereby be influenced in his appreciation of the evidence and issues at the subsequent trial, according to the applicant.

209. The European Court declared that the mere fact that a trial judge or an appeal judge has also made pre-trial decisions in the case, including a decision concerning detention on remand, could not "be held as in itself justifying fears as to his impartiality". 309/ The Court did recognize, however, that special circumstances could warrant a different conclusion.

210. In the Gillow case, 310/ the European Court examined whether the impartiality of a tribunal could be questioned because members of a tribunal took part in two closely related cases. A British couple had been refused a licence to occupy the house where they had previously been living, and the couple was subsequently prosecuted for unlawful occupation. The Royal Court sat almost in the same composition in both Ms. Gillow's civil appeal and in Mr. Gillow's criminal case appeal.

211. The European Court found a factual nexus between the two appeals heard by the Royal Court. Regardless of this nexus the cases related to two different people and two different questions: a civil case concerning the propriety of a refusal by the local Housing Authority to grant a licence to Ms. Gillow, and a criminal case concerning Mr. Gillow's alleged unlawful occupation of the house. The European Court stated that the fact that members of the Royal Court sat in both cases was not, in itself, reasonably capable of giving legitimate doubts as to the impartiality of the Royal Court.

212. The subjective test inquires whether a particular judge is impartial in his personal convictions. The European Commission has stated that "appearance [of impartiality] may be important" and "justice must not only be done: it must also be seen to be done". 311/ Personal impartiality is presumed until there is proof to the contrary. 312/

213. A tribunal will not necessarily be deemed partial because some of its members may be unfavourably disposed to a party. 313/ In the Le Compte case, a disciplinary body, the Medical Association Appeals Council, consisted of members of the judiciary and of medical practitioners. The European Court found the tribunal to be impartial, in spite of the fact that the members that were medical practitioners had very close interests in common with one of the parties in the proceedings. The Court asserted that there was a "definite assurance of impartiality" since half the members of the tribunal were judges, and one of the judges always acts as chairperson and has a casting vote. The length of the members' term of office, six years, provided a further guarantee for impartiality. 314/

214. The Court has stated in the Ringeisen case that it is not a general rule that a superior tribunal, which sets a judicial or an administrative decision aside, is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority. 315/ Consequently, it would not constitute a bias to have the same tribunal deal with the case again.

215. If there is any legitimate reason to fear a lack of impartiality, a judge must withdraw from the tribunal, because "what is at stake is the confidence which the courts must inspire in the public in a democratic society". 316/

H. Tribunal established by law

216. A tribunal which is to determine criminal charges against a person or a person's civil rights or obligations must be established by law. The tribunal determines matters within its competence on the basis of rules of law and it follows proceedings in a prescribed manner. 317/

217. The European Court has found that article 6 (1) does not "require the legislature to regulate each and every detail ... by formal act of Parliament, if the legislature establishes at least the organisational framework for the judicial organisation". 318/

218. Domestic law could thus provide that the executive may institute certain judicial bodies when necessary. In Zand v. Austria, the European Court declared that Austrian labour courts, set up by the Labour Minister in accordance with delegated authority from the parliament, were established by law. 319/

219. An accused may be tried before a special criminal court, provided that the special court is established by law. 320/

IX. RIGHT TO HEAR WITNESSES

220. Article 6 (3) (d) guarantees that individuals charged with criminal offences have the right to examine, or have examined, witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. Article 6 (3) (d) applies only to defendants in criminal cases and not in civil proceedings. 321/ The purpose is to "place the indicated, prosecuted or accused person on an equal footing with the prosecution as regards the hearing of witnesses, but not to give him a right to call witnesses without restriction". 322/

221. In one case, the European Commission suggested that unless an applicant could demonstrate that a witness for the defence could have disproved charges against the defendant, there would be no violation of article 6 (3) (d). 323/ The European Court has noted in the Bricmont case that only exceptional circumstances would lead to a finding that failure to hear a witness violated article 6 (3) (d). 324/ The European Court did not specify what would constitute such "exceptional circumstances".

A. Courts' discretion to allow witnesses to testify

222. The European Court and Commission have noted in numerous cases that article 6 (3) (d) does not give defendants a general right to call witnesses on their behalf and does not allow them to call persons who are not in a position to assist by their statements in elucidating the truth. 325/

223. Domestic judicial authorities have been given "a margin of appreciation which allows them ... to ensure that the hearing of a witness for the defence is likely to assist in ascertaining the truth". 326/

224. In the Engel case, 327/ the European Court noted that article 6 (3) (d) does not require the attendance and examination of every witness on the defendant's behalf. The Court noted that the European Convention gives domestic courts broad discretion to decide whether proposed evidence is relevant and whether a proposed witness would be helpful in ascertaining the truth.

225. The European Court and Commission have rarely found that a domestic court abused its discretion in refusing to call witnesses. A domestic court is permitted to exclude any witness whose testimony it considers irrelevant to the case. 328/

226. In X. v. Federal Republic of Germany, 329/ a school director convicted of homosexuality with dependent persons and of seduction of minors to homosexuality complained that the court refused to hear witnesses who would have attacked the credibility of the minors testifying against him. 330/ The domestic court heard several witnesses who testified to the credibility of the minors, but it refused the defendant's request to hear a psychologist's testimony on the minors' credibility. Additionally, the domestic court refused to call another witness who could have thrown doubt on the minors' testimony. The European Commission held it to be in the domestic court's discretion to decline to hear witnesses and the Commission found no violation of article 6 (3) (d).

227. In another German case, the European Commission dismissed the complaint of an applicant, convicted of aggravated theft, who asserted that the trial court refused to trace and call witnesses who had seen him on the evening of the crime. 331/ The European Commission held that the domestic court had been justified in refusing to summon witnesses when it considered that the witnesses were irrelevant to the applicant's case. The applicant's rights had not been violated.

228. In X. v. Austria, the applicant complained that several of his witnesses were not heard by the court. 332/ The domestic court had refused to call a graphological expert to testify to the validity of the defendant's signature on a forged document. The domestic court had refused to hear witnesses who allegedly would have established that the defendant had suffered financial losses from breach of contract. The European Commission noted that the domestic supreme court had analysed the complaints in detail and had considered the proposed testimony of the witnesses to be irrelevant; hence, there was no violation of article 6 (3) (d).

229. Even if testimony appears to be relevant, the Commission may defer to a doemstic court's judgement that the testimony was irrelevant. In one case, an applicant was convicted of making false accusations against the prison director regarding the beating of a fellow prisoner. 333/

230. The applicant complained that the domestic court had refused to call as witnesses the prisoner who was beaten and another prisoner, a witness to the beating. The European Commission noted first that domestic courts had discretion in deciding whether a witness would help to ascertain the truth. The Commission then deferred to the judgement of the domestic courts, which had held that because the applicant had been accused of making false accusations and the requested prisoners had not been present at the making of the accusations, the witnesses were not necessary to ascertain whether the applicant made the remarks.

231. If a defendant wishes to call a witness to refute the testimony of a prosecution witness, the domestic court has discretion to decide whether such a witness is necessary. For example, an applicant, convicted of murder, complained that a psychiatric witness was biased against her and that the court refused to allow her to call her own psychiatric witness to refute him. 334/ The European Commission held that the domestic court did not violate her right to call witnesses because the domestic court, believing the psychiatric witness to be objective, had found an additional psychiatric witness unnecessary.

232. Even if the testimony of a witness would be relevant, the domestic courts have discretion to limit the number of witnesses a defendant may call. An applicant, convicted under German law for distributing a film magazine "manifestly liable to corrupt the young", complained that he was not allowed to call additional witnesses to support his argument that the magazine was not liable to corrupt the young. 335/. The court had already allowed several witnesses to testify on the distributor's behalf. The Commission dismissed the application because article 6 (3) (d) does not guarantee defendants the right to call all possible witnesses.

233. Domestic courts have some discretion to hear witnesses after both the defence and prosecution have presented their cases. In X. v. United Kingdom, 336/ an applicant charged with conspiring to smuggle non-citizens into the United Kingdom complained that the trial court has allowed the prosecution to call a witness after the evidence for the prosecution and the defence had already been completed. The Commission, noting that the domestic court had considered the evidence relevant to the trial, found no violation of article 6 (3) (d) but added that calling a witness in such circumstances should be a rare exception.

B. Prejudice to the defence

234. The European Court and Commission have rarely found that a domestic court abused its discretion to refuse to call witnesses. To prevail under article 6 (3) (d), a defendant must meet a very high burden of proof. It is not enough to prove that defence was unable to call witnessess. It must be demonstrated that the hearing of a witness was necessary and that failure to hear the witness prejudiced the defence. 337/

235. In X. v. Austria, 338/ an applicant, who had been convicted of fraud, complained that a witness he had called was not heard until the fourth day of trial and that consequently the witness was intimated. The European Commission held that the failure of the domestic court to hear the witness until the fourth day had in no way interfered with the applicant's rights. It made no difference on which day this particular witness was heard as long as he was heard by the court. The Commission found no violation of article (6) (3) (d).

236. Similiarly, in X. v. Switzerland, 339/ an applicant accused of fraud complained that he was unable to call his main witness, who was arrested during the hearing. The trial continued without the presence of this witness. The Commission, noting that the defence was able to present this evidence through another witness, found no violation of article 6 (3) (d). The Commission stated that the arrest of the witness did not prejudice the right guaranteed in article 6 (3) (d).

237. In another case, the applicant complained that the prosecution had withheld statements made by prosecution witnesses months before the trial and had not revealed the statements until only a few days before the trial. The European Commission found no violation of article 6 (3) (d) because there was no indication that the admission of this evidence prejudiced the applicant's case or made the proceedings inequitable. 340/

C. Presence of the accused during testimony of witnesses

238. Generally, the accused has the right to examine witnesses and it is thus essential that the defendant be present during testimony of a witness. 341/

239. In the Bricmont case, 342/ the European Court found a violation of article 6 (3) (d) because the trial court convicted the defendants based on testimony obtained in the absence of the accused. A Belgian prince accused his former attorney of fraud and gave unsworn statements to an investigating judge, in the absence of the defendants, but failed to attend subsequent hearings and the trial. The European Court found that the trial court had essentially relied on the prince's accusations in convicting the defendants and thus held that article 6 (3) (d) had been violated.

240. In exceptional circumstances a domestic court may hear a witness in the absence of the accused. For example, a defendant accused of drug trafficking was ordered to leave the courtroom to allow testimony by a witness fearing reprisal from the defendant. 343/ The European Commission noted that an accused must generally be present when witnesses are testifying at trial. In exceptional circumstances, however, a trial court may hear witnesses in the absence of the accused. The European Commission found the witness' fear of reprisal a sufficiently exceptional circumstance and thus found no violation. Additionally, the Commission also noted that because the trial court had permitted the defence lawyer to remain and cross-examine the witness, the defendant's right to examine witnesses had been protected.

241. Furthermore, article 6 (3) (d) does not require the presence of the accused at a pre-trial hearing of witnesses as long as the accused had the opportunity to cross-examine at the trial. For example, in one case, witnesses told police before the trial that the applicant had sold heroin to them but denied this statement at trial. 344/ The trial court, relying on the pre-trial testimony of the witnesses, convicted the applicant. The Commission held that the applicant was given ample opportunity to cross-examine the witnesses at the trial and, therefore, no violation of article 6 (3) (d) occurred.

242. In addition, defendants do not have a right to examine witnesses at pre-trial investigations unless they can show that the trial court will deny the right to examine the witnesses at trial. 345/ For example, an applicant arrested in Germany for murder complained that she and her attorney were denied the right to be present during pre-trial interviews of witnesses conducted in other countries. 346/ The European Commission held that because German law required witnesses to attend a trial in person, the defendant could not complain that she would be unable to examine the witnesses at trial. Hence, the right to examine witnesses was not violated.

243. Although defendants have a right to be present during testimony of witnesses, a statement of a witness does not always have to be made in court to be admitted into evidence. 347/ In one case, for example, the applicant complained that the domestic court had failed to bring witnesses into court to testify directly and instead had obtained hearsay evidence from two officials who refused to disclose the names of the persons from whom they had obtained information. 348/ The applicant, accused of passing secret information to a foreign country, noted that he was unable to examine the witnesses against him because the witnesses were not in court and that the two officials, testifying to the hearsay evidence in court, refused to divulge the names of the witnesses.

244. The European Commission held that a domestic court has discretion to refuse applicants the right to examine witnesses if the court believes such an examination is unlikely to assist in ascertaining the truth. Moreover, the applicant had not shown that the officials' refusal to name the witnesses was necessary for the court's ascertainment of the truth of the criminal charges against him.

D. Anonymous witnesses

245. The European Court has examined whether the use of anonymous witnesses denies an accused the right to a fair trial. 349/ The European Court has found the use of anonymous witnesses to be inconsistent with article 6. "[T]he [European] Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to found a conviction is another matter." 350/ When interpreting the legality of anonymous witnesses the provision on the right to examine witnesses must be taken together with article 6 (1), which provides that everyone is entitled to a fair hearing in the determination of his or her civil rights and obligations or any criminal charge against him or her.

246. It is consistent with the European Convention to use statements made by anonymous witnesses as evidence at the pre-trial stage, provided that the rights of the defence have been respected. 351/ An accused should be given "an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings". 352/ In the Kostovski case, 353/ the defendant was convicted based on evidence obtained from informants prior to the defendant's arrest and during a pre-trial hearing before a magistrate, in the absence of the defendant and his defence counsel. The Court held that domestic courts may not rely on evidence obtained from anonymous sources whom the defendant has not had the opportunity to challenge.

247. One of the main objections against anonymous witnesses is that if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the particulars to demonstrate that the witness is prejudiced, hostile or unreliable. 354/ Furthermore, a trial court cannot observe a witness' demeanour under questioning and it thus becomes more difficult to form its own opinion of the reliability of the witness. 355/

248. In the Windisch case, 356/ two anonymous witnesses had given their statements to a police officer, who later testified in court about their statements. The defence had been able to question the police officer during the court proceedings and had further been able to put written questions to the witnesses. The European Court stated: "These possibilities cannot, however, replace the right to examine directly prosecution witnesses before the trial court." 357/ "Being unaware of [the witnesses] identity, the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' credibility or cast doubt on their credibility." 358/ The Austrian Government was found to have violated articles 6 (1) and 6 (3) (d).

E. Other article 6 (3) (d) issues

249. Another question of great importance is whether the defence has been able to challenge and question statements made by witnesses. In the Asch case, the applicant was convicted for beating the woman with whom he lived. 359/ The woman refused to testify at trial and, consequently, the court relied on the woman's pre-trial statements to the police as well as on other evidence such as photographs of the woman's battered body and personal impressions of the police officer making the arrest. The applicant argued that he had not had the opportunity to examine the woman's statements during the proceedings. The applicant submitted that by rejecting his application for an expert medical opinion the domestic court had deprived him of the sole means of contesting effectively the allegation of causing bodily harm.

250. The European Court regarded the woman as a witness for the purposes of article 6 (3) (d). The Court pointed out that the woman's statements did not constitute the only evidence on which the domestic court had based its decision. The applicant had the opportunity to discuss the woman's version of events and further to put his own version to the court. The applicant had

chosen not to question the police officer or to call other witnesses. The European Court concluded: "The fact that it was impossible to question [the woman] at the hearing did not ... in the circumstances of the case, violate the rights of the defence, it did not deprive the accused of a fair trial." 360/

251. If a court permits the reading of depositions during trial without objections from the defendant regarding the truth of the deposition, there is no violation of article 6 (3) (d), especially if the authors of the depositions are unable to attend the trial. 361/

252. In the Isgrò case, 362/ a criminal conviction was based in part on statements made by a witness before an investigating judge and read out at the trial. The witness in question was not present at the trial and the Italian authorities could not locate him. The European Court examined whether the applicant had been given an adequate and proper opportunity to challenge and question the witness against him.

253. The European Court noted that the witness was not anonymous. The investigating judge had questioned the witness several times and two confrontations had been organized to compare statements made by the witness and the accused. The defence had thus been able to put questions directly to the witness and to discuss his statements. During the trial the defence could challenge the accuracy of the allegations and the credibility of the witness himself. The European Court further noted that the Italian court did not base its decision solely on statements made by the witness. The European Court thus concluded that there had not been a violation of article 6 (3) (d).

254. If a domestic court makes an effort to find witnesses requested by the defence but is unable to locate them, the court has met the requirements of article 6 (3) (d). 366/* Moreover, defendants are responsible for informing the court of the names and addresses of witnesses for the defence. 367/

255. When witnesses do testify, they do not have the right to testify in the language of their choice. 368/ In Bideault v. France, the applicant complained that a French trial court's refusal to allow witnesses to testify in Breton and its failure to ascertain whether the witnesses spoke French violated article 6 (3) (d). The European Commission found no violation because the witnesses had not alleged that they lacked sufficient command of French and also because witnesses testifying in court have no right to speak in the language of their choice.

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* Notes 363, 364 and 365 have been deleted for technical reasons.

256. Furthermore, the trial court must treat all experts equally, regardless of whether the witness is for the prosecution or for the defence. 369/ In the Bönisch case, the applicant, convicted of violating Austrian food hygiene laws, complained that the person who had reported his violation of the law to authorities had been appointed "court expert", that is, an official who was to be a neutral and impartial arm of the court. The applicant was allowed to have a person testify on his behalf but not as an expert. Additionally, the trial court allowed extensive questioning of the defence witness but not of the court expert. The European Court found the trial court's approach to be a violation of the article 6 (1) requirement of a fair trial, which includes the principle of equality of arms. The Court noted that domestic courts are required to treat the prosecution and defence witnesses equally.

X. PRESUMPTION OF INNOCENCE

257. Article 6 (2) of the European Convention requires that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This requirement applies only to persons charged with criminal offences and not to proceedings involving non-criminal matters. Hence, the European Court and Commission will first independently determine whether a person has been charged with a criminal offence. 370/ The Convention requires that this presumption be maintained until the defendant is proved guilty according to law. 371/ If a person has not been proved guilty according to law, public officials must continue to maintain a presumption of innocence. 372/

258. The presumption of innocence deals only with the proof of guilt and not with the kind or level of punishment. When a domestic court decides upon what penalty to impose, it may take into consideration factors relating to the individual's personality. 373/

259. In determing the scope of this presumption of innocence, the European Commission has examined member States' interpretation of the presumption in their domestic legal systems. 374/ To inform a jury of a defendant's previous convictions has not been found to violate the presumption of innocence because several parties to the European Convention allow this practice. 375/

260. Suspects have the right to a presumption of innocence not only during the trial itself but also preceding the trial. 376/ The presumption is binding both for the judge presiding over the suspect's trial and any other public officials that might deal with the case in any way. 377/

261. A domestic judgement that finds a defendant not guilty is binding on all State authorities. 378/ It should be noted, however, that acquittal during a criminal trial does not prohibit civil courts from establishing civil responsibility based on the same facts. In X v. Austria, a teacher was accused of causing the death of one of his students. The criminal court acquitted him of criminal charges and he appealed the dismissal from his employment in a civil court. The civil court dismissed the appeal. The European Commission noted that the civil court was careful to separate criminal responsibility and civil responsibility. The Commission found that dismissal of the appeal did not violate the presumption of innocence.

262. A public official would violate article 6 (2) by declaring publicly before the trial that a suspect is guilty of a crime. 379/ Public officials are, none the less, allowed to inform the public about criminal investigations, to state that a person is a suspect, that the police have arrested a suspect, and that a person has confessed to a crime. 380/

263. In Krause v. Switzerland, for example, a public official declared publicly that a suspect was guilty of a crime but also noted that the suspect first had to stand trial. 381/ The European Commission found no violation of article 6 (2) because the official was merely informing the public about a criminal investigation.

264. A police press release with photographs of drugs and weapons seized from defendants has not been held to violate the presumption of innocence. The European Commission concluded that the press release did not convey the impression of the defendants' guilt. 382/

265. The European Convention's prohibition on pre-trial statements of guilt by public officials extends to public prosecutors as well. 383/ In Bricmont v. Belgium, the applicant complained of statements made by two prosecutors, reported in the press, allegedly declaring that Bricmont was guilty of forgery and fraudulent conversion. The European Commission, however, noted that press articles were not sufficient proof of the statements and that the statements were intended merely to inform and not as declarations of defendant's guilt.

266. In Mr. and Ms. X. v. United Kingdom, 384/ the European Commission examined statements made by a judge during a criminal trial. During the trial the judge urged the applicants to give up because the evidence against them was so strong. The applicants contended that the judge's statements during the proceedings showed that the principle of presumption of innocence had not been observed. The European Commission found the judge's statements objectionable and that his impartiality could be questioned. Regarding the presumption of innocence, however, the Commission held it shown by the trial transcripts that the applicants were presumed innocent during the proceedings. It was further clear that the burden of proving guilt remained with the prosecution throughout the trial. Hence, the presumption of innocence had been observed.

267. The European Court and Commission have examined various pre-trial actions that raised questions about violations of the principle of presumption of innocence. In X. v. the Netherlands, 385/ the European Commission held that a requirement of submission of a blood test for alcohol level analysis did not violate the presumption of innocence, even if the test was administered before the suspect was charged with drunk driving. The European Commission noted that test results could show that a suspect was innocent. Hence, the test did not violate the rule of presumption of innocence.

268. Discontinuing civil proceedings until pending criminal proceedings are resolved has not been found to violate the presumption of innocence. 386/

269. In C. v. United Kingdom, 387/ the European Commission found no violation of the presumption of innocence by British authorities who handed over an Indian national to Indian authorities. The applicant was accused of deserting from the Indian army. The applicant argued that the British authorities presumed his guilt by delivering him on complaint from the Indian army. The European Commission held that the presumption of innocence was not violated. The Indian army had been required to present a certificate of desertion and furthermore, the defendant had an opportunity to rebut the information in the certificate in proceedings before a British magistrate.

270. Convicting a defendant the second time for the same offence has not been found to violate the presumption of innocence, provided that the court makes an independent assessment of the evidence. 388/ In S. v. Federal Republic of Germany, the defendant was convicted in the Netherlands of heroin possession and sentenced to imprisonment. After being released, he was arrested in Germany and tried again for the same offence. The European Commission found no violation because it noted that even though the German court was aware of the previous judgement, it relied on statements the defendant made in Germany and not on the previous judgement. Hence, the presumption of innocence had been observed.

271. In principle, the European Convention does not prohibit presumptions of fact or law in domestic legislation. It requires the member States to remain within certain limits in this respect as regards criminal law. 389/ The words "according to law" in article 6 (2) must not be interpreted as a way for Governments to circumvent the requirement of presumption of innocence. Article 6 (2) requires that States that have adopted rules regard presumptions of facts or law in their domestic legislation must confine such presumptions "within reasonable limits which take into account the importance of what is at stake" and the domestic legal system must further maintain the rights of the defence. 390/ A legal system that contains rebuttable presumptions of fact thus does not violate the principle of presumption of innocence. 391/

272. In X. v. United Kingdom, 392/ the European Commission examined a domestic statute which allowed British courts to presume that a man who lived with, or was habitually in the company of, a prostitute was knowingly living on the earnings of the prostitute, unless he could prove to the contrary. The European Commission analysed the wording of the presumption, its substance and its effect, and concluded that the statute did not violate article 6 (2). The presumption of fact and law allowed the defendant to prove his innocence, and therefore it did not amount to a presumption of guilt.

273. In the Salabiaku case, 393/ the European Court examined a French customs law that created presumptions of fact regarding the smuggling of prohibited goods. Under French law, the defendant could disprove the customs offence. The European Court found that the French courts had carefully examined the evidence favouring the defendant and they had not resorted automatically to the presumption of fact and law. The customs law was thus not an irrebuttable presumption of guilt.

274. The European Court has further declared that "[t]he presumption of innocence will be violated, if, without the accused having previously been proved guilty according to the law and, notably, without his having had the opportunity of exercising his right of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty". 394/ The purpose of article 6 (2) is thus to protect a person, who has not been convicted by a final judgement, against any judicial decisions which would reflect an opinion of the person's guilt. 395/

275. The European Court and Commission have asserted that ordering an acquitted person to bear the costs for criminal proceedings can reflect an opinion of guilt. In the Minelli case, 396/ the European Court found a violation of the presumption of innocence. A domestic court had ordered an acquitted person to pay part of the expenses of the prosecution. The defendant had been acquitted because the statutory limitation period had expired. The domestic court considered that the prosecution had proven the applicant's guilt, although he could not be convicted for the offence. The domestic court based its decision on an assumption that the applicant would have been convicted but for the expiration of the limitation period.

276. The Italian court's reasoning, however, was based on judgements made in two other cases to which the applicant had not been a party and which were distinct from the applicant's case. The European Court noted that the domestic court had essentially declared the defendant guilty but without proving the defendant's guilt according to law. Hence, the European Court found that the domestic court had violated the presumption of innocence.

277. I. and C. v. Switzerland 393/ also dealt with a statutory limitation. A Swiss court had assessed court costs against defendants who were not convicted because of the expiration of a statutory limitation period. The domestic court had made statements that amounted to a finding of the applicants' guilt in respect of offences of which they had not been legally convicted. It was on the basis of this finding that the applicants were ordered to pay part of the investigation and the court costs. The European Court found a violation of article 6 (2). 394/

278. The European Convention does not give a person charged with a criminal offence a right to reimbursement from the Government of his or her costs where proceedings taken against him or her are discontinued. 395/ The European Court has asserted that a refusal to reimburse necessary costs and expenses does not in itself offend the presumption of innocence. 396/

279. In the Lutz case, 397/ a German court refused to reimburse expenses for defendants who were not convicted but who were still "under suspicion". The applicant challenged the reasons given by the court for its refusal. In refusing to reimburse expenses to the acquitted defendant, the domestic court refrained from declaring its opinion of the acquitted defendant's guilt. Instead, the domestic court noted merely that the defendant was under a "state of suspicion" of guilt. The European Court found no violation of the rule of presumption of innocence. 398/

280. The provisional seizure of a suspect's money as security for costs of the criminal proceedings against him has not been found to violate the presumption of innocence because it did not affect the question of the suspect's guilt. 399/

281. In C. Family v. Switzerland, 400/ a Swiss court had ordered the defendants to pay the costs for the proceedings. The court's rationale was that the defendants' irresponsible behaviour had led to their prosecution and that they should therefore pay the expenses. The European Commission held that the presumption of innocence had been observed by the Swiss court.

XI. RIGHT TO A PUBLIC HEARING

282. Article 6 (1) of the European Convention generally requires that judicial proceedings be conducted in public. 401/ This right is, however, limited to hearings that involve the determination of a criminal charge or of a civil right or obligation. 402/ The European Convention also requires that tribunals pronounce their judgements publicly.

283. The European Court has declared that the public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny, and it is one of the means of maintaining confidence in the courts. 403/ The Court has further stated that "by rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6 (1), namely a fair trial". 404/ The right to a fair trial does not, however, require the courts to publicize a case before trial nor to make lists available of cases that the court will hear. 405/

284. The legislative systems and judicial practices of the member States of the Council of Europe reveal some diversity as to the scope and manner of implementation of the public hearing requirement. The European Court has held that the formal aspect of this matter is of secondary importance as compared with the purpose underlying the public hearing required by article 6 (1). 406/

A. Exceptions from the requirement of a public hearing

285. Article 6 (1) permits several exceptions from the requirement of a public hearing under certain conditions. Closed trials are permitted "in the interests of morals, public order or national security, and where the interests of juveniles or protection of the private life of the parties so require". These limitations must, however, be narrowly construed. Domestic judicial authorities have been given some discretion in deciding whether an exception from the requirement of public hearing shall be allowed. 407/

286. The European Court has accepted application of the "public order" exception in the Campbell and Fell case, 408/ when allowing national authorities to exclude the public from disciplinary proceedings in a prison. The Court suggested that difficulties of greater magnitude arise in prison disciplinary proceedings than in other proceedings, due to security problems and the possible propagation of malicious allegations. The European Court found that disciplinary proceedings concerning prisoners did not have to be

held in public because it would impose a "disproportionate burden on the authorities of the State". 409/ The European Court found sufficient reasons of public order and security justifying the exclusion of the press and the public. 410/ Article 6 (1) had not been violated.

287. In the Le Compte case, 411/ three Belgian medical practitioners' right to practice medicine had been suspended by the disciplinary body of the Belgian Medical Association in non-public proceedings. The European Court stated that there was no evidence in the case suggesting that any of the enumerated exceptions were involved. The proceedings were not concerned with medical treatment of patients, nor did they deal with matters of professional secrecy or protection of the private lives of the doctors themselves or their patients. The European Court concluded that there was nothing that could have justified the disciplinary body sitting in camera. 412/ The applicants had consequently been entitled to have the proceedings conducted in public.

288. In the interests of juveniles the European Commission has allowed closed proceedings in a case that involved sexual offences committed against minors. 413/

289. In the "interest of justice" the Commission has accepted closed hearing in the protection of a very nervous witness. 414/ Application of the "interest of justice" exception has been left within the "margin of appreciation" which is ordinarily afforded to domestic authorities. 415/

B. Proceedings in appellate courts

290. In the Adler v. Switzerland case, 416/ the European Court asserted that "the principle of publicity must be fully respected at least in one instance dealing with the merits of a case unless one of the reasons enumerated in article 6, paragraph 1 ... is present". The right to a public trial would thus not apply to all appellate proceedings. The European Court and the Commission have limited the right to proceedings that examine the merits of a case. 417/ Non-public proceedings at an appellate level have not been held to be in violation of article 6 (1) when the lower court proceedings were public, 418/ and when the appellate court did not examine new points of law. 419/

291. The European Commission has found that written proceedings may be sufficient in appellate proceedings, which deal exclusively with legal questions of a technical and abstract character. 420/

292. In the Sutter case, 421/ a Swiss national doing his military service refused twice to comply with service regulations relating to haircuts. Sutter was subjected to military arrest and the Divisional Court sentenced him to 10 days' imprisonment. The applicant appealed to a Military Court of Cassation, which dismissed his appeal without previously holding a public hearing. The proceedings were conducted in writing and in camera. The European Court had to decide whether the non-public proceedings in the appellate court constituted a breach of article 6 (1).

293. The European Court found that the proceedings did not rule on the merits of the case but only involved interpretation of the legal provisions concerned. The European Court declared that there was nothing to suggest that the hearing before the appellate court was less fair than the public trial before the Divisional Court and there had not been a breach of article 6. 422/

294. In the Axen case, 423/ a victim of a traffic accident brought an action against the driver and the owner of the other vehicle. The lower court found in favour of the defendant, and the appellate court dismissed the applicant's appeal without holding a public hearing, since it unanimously considered the appeal to be ill-founded on points of law and since oral arguments were held to be unnecessary.

295. The European Court stated that the decision was justified by the special features of the proceedings viewed as a whole. The lower court had heard the case in public before giving a ruling, and furthermore the appellate court determined solely issues of law and did not rule on the merits of the case. The dismissal of the appeal was based on points of law. In the particular circumstances, the absence of public hearings was not found to infringe article 6 (1). 424/

296. The European Court has consequently held that the absence of a public hearing before a second and a third instance may be justified by the special features of the proceedings. 425/

297. The European Court has not found a violation if the main proceedings in a case are public, 426/ or if an applicant can appeal a single judge's examination to a public tribunal. 427/ In X. v. United Kingdom, the applicant had been convicted of taking documents and of obtaining a passport unlawfully. The applicant argued that he had been denied a public hearing by the appellate court deciding on his application for leave to appeal. Under English law, leave to appeal is decided by a single judge sitting in chambers. If leave to appeal is refused, however, the applicant is entitled to renew his application to the full Court of Appeal, where the proceedings are held in public. The European Court found that the applicant had not exercised his right to renewal of application and he had thus failed to exhaust the remedies available to him. There had consequently not been a breach of article 6 (1).

298. The European Court has stated that the defect of a non-public proceeding may be cured by public hearings at a later stage of the proceedings. 428/

C. Waiver of the right to a public hearing

299. The European Court has declared that article 6 (1) permits a person to waive his or her right to a public trial. A waiver must be given of one's own free will and it must be made in an "unequivocal manner". 429/ A hearing in camera would thus not conflict with the European Convention if it takes place with the consent of the parties concerned. 430/ Moreover, the waiver must not run counter to any important public interest. 431/ There is a

possibility to waive the right of a public hearing, but this fact does not constitute a right to a hearing in camera. The domestic courts are given some discretion to decide whether in camera proceedings would be in conflict with the public interest.

300. In the Hakansson and Sturesson case, 432/ the applicants initiated proceedings against a compulsory auction of property. The Court of Appeal was the first and only tribunal to deal with all the aspects of the applicant's complaint. The applicants argued that they had been entitled to a public hearing in the appellate court. Swedish law expressly provided for the possibility of holding public hearings in the Court of Appeal. The European Court found that the applicants had not made an express waiver of their right to a public hearing. A question arose whether the applicants had made a tacit waiver of their right to a public hearing.

301. The European Court held that the applicants could have been expected to ask for such a hearing if they found it important that one be held. The applicants did not ask for a hearing, however, and they must thereby be considered to have "unequivocally waived" their right to a public hearing before the Court of Appeal. 433/ The European Court further stated that the litigation did not appear to involve any question of public interest which could have made a public hearing necessary. There had consequently not been a violation of article 6 (1).

302. If domestic law requires that the accused choose whether to have a public trial in first instance and the accused does nothing, such inaction would not constitute a waiver of the right, according to the European Commission. 434/

303. Adler v. Switzerland 435/ dealt with a Swiss national who had allegedly suffered damages in his commercial activities because of the acts of public officials. The applicant argued that the Swiss Federal Court in first instance had wrongly dismissed his action for damages without a public hearing. The Swiss Government argued that the applicant had failed to exhaust domestic remedies because he could have requested the court not to deal with his case in summary proceedings, but to grant him a public hearing. The European Commission declared that parties to first instance proceedings should in principle expect that their case will be decided in a public hearing.

XII. RIGHT TO A FAIR HEARING

304. The European Convention guarantees all persons the right to a "fair hearing" in the determination of their civil rights and obligations or of criminal charges against them. The European Convention does not define the words "fair hearing". 436/

305. "Fair hearing" is a sub-definition of the larger concept "fair trial", which can be exemplified by the rights enumerated in articles 6 (2) and 6 (3). 437/ "Fair trial" is not to be interpreted restrictively 438/ and the minimum rights enumerated in article 6 (3) are not exhaustive, according to the European Commission. 439/ The European Court has stated that the "[i]ntrinsic aim [of the rights guaranteed in article 6 (3)] is always to ensure ... the fairness of the criminal proceedings as a whole". 440/

306. It is possible "that a trial may not conform to the general standard of a fair trial, even if the minimum rights guaranteed by [articles 6 (2) and 6 (3)] have been respected". 441/ Article 6 (3) represents specific applications of the general principles established in article 6 (1), and a finding of a breach of article 6 (3) dispenses with the need to examine the case in the light of article 6 (1). 442/

A. Principle of equality of arms

307. The European Commission has stated that in criminal proceedings a "fair hearing" requires respect for the principle of equality of arms between the prosecution and the accused. 443/ The principle of equality of arms is an inherent element of a "fair trial", imposing procedural equality between the accused and the public prosecutor. 444/

308. In the Bönisch case, 445/ the European Court found a lack of equal treatment of the parties because an expert appearing as a witness for the prosecution had a stronger procedural position than another expert appearing for the defence. The witnesses were to be given equal treatment. The European Court further held that article 6 (3), which provides that an accused has the right to examine witness against him or her, is a constituent element of the concept of "fair trial" set forth in article 6 (1). The Court declined to consider a complaint under article 6 (3), but that did not preclude it from finding a violation under more general grounds of article 6 (1). 446/ Each case should thus be examined with regard to the "development of the proceedings as a whole and not on the basis of one particular incident". 447/

309. In the Brandstetter case, 448/ the European Court also examined the position of an expert in the proceedings. An Austrian winemaker had been convicted of adulteration of wine, tampering with evidence and defamation. A court-appointed expert had earlier reported the initial suspicions concerning the applicant. The applicant contended that the principle of equality of arms had been breached because the domestic court had refused to hear any other expert and not called the expert commissioned by the applicant. The Austrian Government argued that the expert in question was "a neutral and objective auxiliary of the court". 449/

310. The European Court took into consideration the position occupied by the expert throughout the proceedings and the manner in which he performed his functions. 450/ The European Court declared that "[t]he fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice". 451/

311. The European Court further noted that the applicant had not raised any objections against the expert giving statements during the first and second hearing of the case. The domestic court's refusal to appoint another expert could not be seen as a breach of the principle of equality of arms. The European Court found no violation of article 6 (1) read in conjunction with article 6 (3) (d) of the Convention.

312. The case of Barberà, Messequé and Jabardo 452/ also exemplifies the principle of equality of arms. The European Court considered whether the proceedings as a whole fulfilled the requirements of "fair hearing". The applicants had been convicted of a terrorist attack in Spain and they argued that adverse circumstances in connection with the trial resulted in denial of a "fair hearing". The applicants had been transferred 600 kilometres to another city the night before the trial and they were not able to rest properly before the hearing. The European Court asserted that the applicants thus had to face a trial in "a state which must have been one of lowered physical and mental resistance", and this circumstance weakened their position at a vital moment when they needed all their resources. 453/

313. The European Court also examined the taking of evidence in the case. The Court stated that the prosecution and the defence must be treated equally and the hearing of witnesses must in general be adversarial. 454/ All the evidence must, in principle, be produced in the presence of the accused at a public hearing with a view to adversarial argument. The Court held that the applicants never had an opportunity to examine a vital witness's testimony. 455/ Crucial pieces of evidence had not been adequately adduced and discussed at the trial in the applicants' presence. The European Court found that the proceedings, taken as a whole, did not satisfy the requirements of a "fair hearing".

314. The principle of equality of arms applies in civil proceedings as well. One aspect of the principle is that a party should have a reasonable opportunity to present his or her case to a court under conditions where the party has a position equal to the opponent. This principle can be exemplified by X. v. Sweden, in which a man residing in Germany filed a petition in a Swedish court applying for a right of access to his infant son living in Sweden. The Swedish immigration authorities refused Mr. X entry into the country, based on the fact that the court had not ruled that the applicant's personal appearance in court was necessary. Mr. X argued that the Swedish authorities had violated article 6 (1) by not allowing him to appear in person in the proceedings and thus depriving him of the right to a fair hearing.

315. The European Commission held that article 6 (1) appears to contemplate that everyone who is "a party to civil proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him under substantial disadvantage *vis-à-vis* his opponent". The European Commission found that the personal character and manner of life of Mr. X were matters directly relevant to the formation of the court's opinion, and thus it could be argued that Mr. X was placed at a substantial disadvantage by not being allowed to be present. The case was found inadmissible, however, on the ground of non-exhaustion of domestic remedies. 456/

B. Right to be present during proceedings

316. The European Court has stated that although it is not expressly mentioned in article 6 (1), the object and purpose of the article taken as a whole shows that a person "charged with a criminal offence" is entitled to take part in the hearing of the case. 457/ It would be difficult to exercise the rights

guaranteed in article 6 (3) (c), (d) and (e) without being present. 458/ Hence, as a general principle article 6 (1) requires that a person charged with a criminal offence is entitled to take part in the trial hearing. 459/

317. The Monnell and Morris case 460/ also dealt with the right to be present during criminal proceedings. The applicants had been sentenced to imprisonment and they sought leave to appeal against the conviction. The English Court of Appeal refused leave to appeal and ordered that the time spent in custody pending the determination of the application for leave to appeal, should not count towards service of the sentence. Neither of the applicants were present in person nor were they heard in oral argument during the proceedings. The applicants argued that they had been denied a fair trial in breach of article 6 because they had not been allowed to attend or to be represented in the proceedings before the Court of Appeal. The European Commission stressed the risk that the applicants would suffer a substantial loss of liberty, and decided that they should have been allowed to be present and enabled to be heard. The Commission concluded that the applicants had been deprived of a "fair hearing".

318. The European Court, however, did not agree with the Commission. The Court held that the principle of equality of arms had been respected because neither the applicants nor the prosecution had been represented before the Court of Appeal so the applicants had thus not been placed at a disadvantage as compared with the prosecution. 461/ The applicants had the opportunity to submit written grounds of appeal and they had further been given warnings about pursuing applications for leave to appeal without arguable grounds.

319. In the opinion of the European Court, "[t]he interests of justice and fairness could ... be met by the applicants being able to present relevant considerations through making written submissions". 462/ The Court recognized that it was a shortcoming that prospective applicants for leave to appeal might not be informed adequately about the risk of not having time spent in detention counted towards service of a sentence, but in the Court's opinion this argument could not be decisive for the case. The applicants had not been denied a fair procedure as guaranteed in articles 6 (1) and 6 (3) (c).

320. In the Colozza case, 463/ an applicant had been sentenced to imprisonment without being present at the trial. The applicant argued that he had not been aware of the proceedings instituted against him and he had therefore not been able to defend himself. The Italian authorities claimed that they had not been able to find the applicant. The European Court had to decide whether the combined recourse to the procedure for notifying persons who were untraceable and the procedure of holding a trial by default deprived the applicant of the right to a fair trial.

321. The European Court stated that even if a State would allow trial by default, this procedure would not justify "[a] complete and irreparable loss of the entitlement to take part in the hearing". A person "charged with a criminal offence" should, once he becomes aware of the proceedings, "[b]e able to obtain ... a fresh determination of the merits of the charge". Furthermore, a person "charged with a criminal offence" who is subject to trial by default "must not be left with the burden of proving that he was not

seeking to evade justice or that his absence was due to _force majeure_". _464_/ The fact that the applicant was entitled to lodge a "late appeal" was not enough to fulfil the requirements of article 6 (1), and the European Court thus found a violation of article 6 (1).

322. Similarly, in the Brozicek case, _465_/ the applicant was convicted _in absentia_. The Italian authorities argued that the public prosecutor had not been able to notify the applicant and inquiries to find the applicant had not been successful. The applicant submitted that he had not been given the possibility of participating in the trial to defend himself and he had therefore not received a fair trial. The European Court held that it was unclear whether the applicant had been aware of the proceedings, since the judicial notification had been returned to the prosecutor's office unclaimed and the summons to appear before the court had been lodged with the court registry. It had not been established that the applicant had intended to waive his right to participate in the trial. The European Court found that the trial had not been fair within the meaning of article 6 (1).

323. In F.C.B. v. Italy, _466_/ the applicant had been convicted for involvement in armed robbery, murder and attempted murder. The appellate court acquitted him for lack of evidence. The Court of Cassation remitted the case to the appellate court. Meanwhile, the applicant had left the country without notifying the authorities of his change of address. The applicant had been detained in the Netherlands and could not attend the criminal proceedings against him in Italy. The Italian court tried him _in absentia_ and sentenced him to 24 years' imprisonment.

324. The European Court first noted that the applicant was charged with very serious crimes and that he had not expressed the wish to waive attendance. In spite of these facts the domestic court had not adjourned the trial, nor had it investigated the matter further to see if the applicant consented to not being present; it merely stated that it had not been provided with proof that he was unable to attend. It was clear from the case that the Dutch authorities had in fact informed the Italian authorities about Mr. F.C.B. being detained in the Netherlands. The European Court held the Italian authorities behaviour to be "scarcely compatible with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by article 6 are enjoyed in an effective manner". _467_/

325. The Italian Government argued that the applicant had omitted to inform the authorities of change of address and that the applicant had the responsibility to prove that he was unable to attend the trial. The European Court declared that it had not been shown that the applicant was aware of the date of the trial. Moreover, the applicant's conduct did raise certain doubts but the consequences which the Italian judicial authorities attributed to it were "manifestly disproportionate, having regard to the prominent place the right to a fair trial holds in a democratic society within the meaning of the Convention". _468_/ The European Court found a violation of article 6 (1) in conjunction with article 6 (3) (c).

326. An accused can waive exercise of the right to appear at a hearing. 469/ A waiver must be "established in an unequivocal manner". 470/ Consequently, a waiver cannot be presumed easily by the Government bringing criminal charges against a person. In the Colozza case, the Italian authorities presumed that the applicant had given such a waiver and that he had chosen not to be present at the proceedings against him. According to Italian law, an individual is presumed to have waived the right to be present at trial when he or she wilfully evades the law.

327. Article 6 (1) does not explicitly guarantee a person the right to be present in civil proceedings, but according to the European Commission it does imply the right to be present at the hearing of a case. 471/

328. In Ofner v. Austria, a plea of nullity of a judgement was examined at a non-public hearing in the absence of the applicant and his lawyer. The plea of nullity was dismissed. The applicant considered the proceedings to be in violation of article 6 (1). The European Commission stated that since the proceedings were held in the absence of the applicant the "[b]alance between the two parties was upset in favour of one of the parties with the result that the hearing was no longer fair". 472/

329. The Feldbrugge case dealt with proceedings determining the right to health insurance and the possibility to appeal decisions concerning such rights. 473/ The applicant argued that she had not received a fair trial before the President of the Appeals Board. The European Court stated that the procedure before the President of the Appeals Board did not allow "proper participation of the contending parties". 474/ The President had not heard the applicant nor asked her to file written pleadings. The applicant and her counsel had not been given the opportunity to consult evidence which constituted the basis of the decision, nor had they had a full opportunity to challenge the merits of the decision. The procedure thus did not allow the applicant to effectively exercise her right to be heard and the European Court concluded that article 6 (1) had been violated. 475/

C. Procedural rules regarding evidence

330. An individual's right to a "fair trial" can be affected by domestic procedural rules regarding evidence being allowed in proceedings. The European Court has declared that article 6 "[d]oes not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law". 476/ It is for the national courts to assess the evidence before them as well as the relevance of the evidence which an accused seeks to adduce. 477/

331. In the Delta case, 478/ the European Court asserted: "In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean ... that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent" with article 6 (1) and 6 (3) (d), provided the rights of the defence have been respected. An

accused should be given "adequate and proper opportunity to challenge and question a witness against him [or her], either at the time when the witness makes his [or her] statement or at some later stage of the proceedings". 479/

332. The applicant in the Delta case contended that he had been tried exclusively on the basis of written evidence, in accordance with a practice of taking hearsay evidence from policemen. The evidence had been taken in the absence of the applicant and of his counsel. The European Court held that the applicant had not had adequate opportunity to examine the evidence and had therefore been unable to test the witnesses' reliability. The European Court concluded that articles 6 (1) and 6 (3) (d) had been violated. 480/

333. The applicant in the Schenk case 481/ argued that his right to a fair trial had been infringed by a Swiss court allowing the prosecution to use unlawfully obtained evidence. The European Court examined whether the trial as a whole had been fair, in spite of the evidence having been allowed. The applicant had been able to oppose the use of the evidence, and the fact that his attempt was unsuccessful made no difference. Moreover, the unlawfully obtained evidence was not the only evidence on which the conviction was based. The European Court concluded that the use of the evidence did not deprive the applicant of a fair trial. 482/ Four of the judges of the European Court dissented and stated: "No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the [European] Convention." 483/

334. In the Bricmont case, one of the applicants, a former lawyer and agent of a Belgian prince, was charged with misappropriation of the prince's assets. 484/ The applicant claimed that he had been denied a "fair hearing", because of the manner in which evidence was taken and because of a failure to arrange confrontation between the applicant and the prince. The applicant argued that the prince's unsworn testimony "was given in accordance with a 'prearranged' understanding between the Crown Prosecutor's Office and the investigating judge" and thus made the procedure unfair. 485/

335. The European Court declared that the mere fact that Governments have special regulations in domestic law for the taking of evidence from "high-ranking persons of State", such as the prince, does not as such violate article 6 of the European Convention. 486/ The criminal proceedings brought against the applicant were based on the prince's accusations. According to the European Court, the right to a fair trial required in principle that the applicant should have an opportunity to challenge any aspect of the complainant's account during a confrontation or an examination. 487/ The European Court found that article 6 of the Convention had been violated.

336. In the Olsson case, 488/ the applicants' three children had been taken into public care by the Swedish authorities. The European Court held that circumstances, such as a witness being in the courtroom before giving evidence and the administrative court's alleged failure to remind a witness of the obligation to tell the truth and to insist that a witness answer certain

questions, were not sufficient to show that the proceedings were unfair. The applicants had been represented by a lawyer at all times and were thus able to submit arguments as they saw fit. The European Court viewed the judicial proceedings as a whole and came to the conclusion that article 6 (1) had not been violated.

D. Appellate proceedings

337. Another question which should be discussed in connection with "fair hearing" is whether the requirements of article 6 extend to proceedings in appellate courts. In the Delcourt case, 489/ the European Court established the principle that the protection afforded by article 6 does not cease with the decision at first instance. The rule is, however, not absolute and the manner of application of article 6 is dependent on the particular features of the proceedings involved. 490/

338. When determining whether an individual has been given a "fair hearing" at the appellate level, the European Court has considered different factors. In the Monnell and Morris case, the European Court held that such factors were: the nature of the procedure at the appellate level and its significance in the domestic legal order; the role of the appellate court in the domestic law; the scope of the appellate court's powers; and the manner in which the applicant's interests were protected before the appellate court. 491/

339. The European Court applied these criteria on proceedings in appellate courts in the Ekbatani case. 492/ The applicant argued that he had been denied the right to a "fair hearing" because a Swedish Court of Appeal had decided the case without a hearing. The European Court had to decide whether a departure from the principle that there should be a public hearing at which the accused should be present, could be justified by the special features of the domestic proceedings viewed as a whole.

340. The European Court regarded the nature of the Swedish appeal system, the scope of the Court of Appeal's powers, and the manner in which the applicant's interests were presented and protected before the Court of Appeal. The Swedish Government argued that it was not necessary to grant the applicant a new hearing since the applicant had been given a "fair hearing" in the lower court, and since the Court of Appeal could not increase the sentence imposed on the applicant by the lower court. The European Court held that the principle of equality of arms had been observed in the Court of Appeal. 493/

XIII. PUBLIC PRONOUNCEMENT REQUIREMENT

341. Article 6 (1) of the European Convention requires that judgements shall be pronounced publicly. The purpose of this provision is that the public character of proceedings before judicial bodies "protects litigants against the administration of justice in secret and with no public scrutiny". 494/

342. Although the member States all subscribe to the principle of publicity, the legislative systems and judicial practices of the countries show some diversity in the scope and manner of publicity. The European Court has stated that the "formal aspect of the matter is ... of secondary importance as compared with the purpose underlying the publicity required by article 6 (1)". 495/

343. In the Pretto case, 496/ a judgement of an Italian appellate court was not pronounced in open court but simply deposited in the court registry, with written notification of the operative provisions being given to the parties in the case. The European Court noted that many member States of the Council of Europe "have a long-standing tradition of recourse to other means, besides reading aloud, for making public the decisions" of courts, such as deposit of the judgement in a court registry accessible to the public. Although the wording of the provision might suggest that a reading aloud is required, the European Court did not feel bound to adopt a literal interpretation of the public pronouncement.

344. The form of publicity given under domestic law in each individual case had to be "assessed in the light of the special features of the proceedings in question and by reference to the object and purpose" of article 6 (1). The European Court thus examined the entirety of the proceedings conducted and the appellate court's role. It was further pointed out that anyone could consult or obtain a copy of the judgement in the court registry. The European Court came to the conclusion that the deposit of the judgement in the registry did satisfy the requirements of article 6 (1).

345. In the Axen case, 497/ the applicant argued that the public pronouncement requirement had been violated on the ground that the judgement was served on the parties but not announced in open court. The European Court did not find that the absence of public pronouncement contravened the object pursued by article 6 (1).

346. Similarly, in the Sutter case, 498/ the judgement was only served on the parties in the case. The public could consult or obtain a copy of the full text of the judgement from the court, and many of the more important decisions were published in an official publication. The court's jurisdiction was therefore held to be open to public scrutiny. The absence of public pronouncement did not violate article 6 (1), according to the European Court.

347. In the Campbell and Fell case, 499/ the tribunal had not taken any steps to make the judicial decision public. Even if the proceedings were held *in camera* the judgement itself had to be public. The European Court held it to be a violation of the requirement of public pronouncement.
